

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

**BRIEF AND APPENDIX
FOR PETITIONER**

IN THE
United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA

UNITED STATES
COURT OF APPEALS FOR THE
DISTRICT OF COLUMBIA

No. 8390

FILED JAN 19 1934

THE CHESAPEAKE AND POTOMAC TELEPHONE
COMPANY, *Petitioner,*

v.

DISTRICT OF COLUMBIA, *Respondent.*

**Petition for Review of Decision of the Board of Tax Appeals
for the District of Columbia.**

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BRIEF OF PETITIONER.

JURISDICTIONAL STATEMENT.

As required by Paragraph 5 of Section 6 of the Act of July 1, 1902 (32 Stat. 590, 619) Petitioner filed its returns of gross earnings as the basis of taxes for the fiscal years ending June 30, 1939 and June 30, 1940 (referred to herein as fiscal year 1939 and fiscal year 1940) and at the times required by law paid the taxes assessed thereon by the Assessor for the District of Columbia; and as required by Section 2(a) of Title IV of the District of Columbia Revenue Act of 1939 (Act of July 26, 1939, Ch. 367—Title IV, Sec. 4(a)—53 Stat. 1085, 1107) filed its return of gross re-

ceipts as the basis for taxes for the fiscal year ending June 30, 1941 (referred to herein as fiscal year 1941), and at the times required by law paid the taxes assessed thereon by the Assessor for the District of Columbia (Petitioner's App., 22, 26).

By letter dated April 25, 1941 Respondent required Petitioner to file revised returns for the three fiscal years here involved, and include therein as taxable certain items which were omitted in the original returns (Petitioner's App., 24, 27, 28). Respondent assessed taxes and penalties on the basis of the revised returns, which said assessments were paid under written protest by Petitioner, and an appeal therefrom was filed with the Board of Tax Appeals for the District of Columbia, within the time prescribed by law (Petitioner's App., 24, 26, 32).

The Board of Tax Appeals for the District of Columbia, by a decision dated September 10, 1942, confirmed the action of the Assessor for the District of Columbia in respect to the taxes for the fiscal years 1939 and 1940, and with respect to taxes for the fiscal year 1941 directed a refund to Petitioner of the sum of \$708.79, and in other respects confirmed the action of the Assessor for the District of Columbia (Petitioner's App. 48).

As provided by law (Act of May 16, 1938, ch. 223—Title IX, Sec. 4(a)—52 Stat. 356, 370) Petitioner within thirty (30) days after the decision filed with the Board of Tax Appeals for the District of Columbia its Petition for Review by the United States Court of Appeals for the District of Columbia (Petitioner's App. 49). The record was filed in this Court on November 6, 1942.

STATEMENT OF CASE.

This case involves the tax liability of Petitioner for the fiscal years 1939 and 1940 under the Act of July 1, 1902 (32 Stat. 619), which Act will be referred to herein as the "Gross Earnings Statute" and for the fiscal year 1941 under the District of Columbia Revenue Act of 1939 (53 Stat.

1107), which Act will be referred to herein as the "Gross Receipts Statute". Under both statutes taxes for a fiscal year are based on revenues for the prior fiscal year. The controversy involving each statute will be separately stated.

(a) Tax Liability Under "Gross Earnings Statute".

For the fiscal years 1939 and 1940 Petitioner in its original returns of gross earnings subject to taxation under the "Gross Earnings Statute" deducted from its total revenues the raw material costs incurred in the manufacture or publication of telephone directories. The raw material costs referred to are costs of paper, printing, binding and transportation, which costs amounted to \$202,879.51 and \$216,150.08 respectively for the two years here involved (Petitioner's App. 22, 23). The forms used by Petitioner for both years were furnished by Respondent for that purpose and such forms contained a space or provision for the deduction of such raw material costs (Petitioner's App. 25). Furthermore the returns were identical in form and contained the same general items as the returns filed by Petitioner for all prior years since 1931 (Petitioner's App. 25).

The telephone directory is a publication issued by Petitioner and furnished to its subscribers with no specific charge therefor. It contains an alphabetical listing of telephone subscribers and other information to assist subscribers in the use of telephone facilities. The amounts of \$202,879.51 and \$216,150.08 deducted by the Petitioner in its original returns for the fiscal years 1939 and 1940, respectively, represent amounts expended by the publisher engaged by Petitioner for paper, printing, binding and transportation in connection with directories. All other expenses in connection with directory activities, such as cost of compilation, distribution to subscribers and sales of advertisements were not deducted but were included in the originally reported taxable amounts (Petitioner's App. 25).

On April 25, 1941 Petitioner was first advised by Respondent that the forms furnished it for Gross Earnings re-

turns were in error, and that the exclusion of the raw material costs of directories was contrary to law. Accordingly Petitioner was requested to file a revised return for the fiscal years 1939 and 1940, and include therein as taxable the items deducted from the original returns as aforesaid, which revised returns were filed on November 17, 1941. Respondent assessed additional gross earnings taxes and penalties for the fiscal year 1939 in the amount of \$10,225.12, and for the fiscal year 1940 in the amount of \$9,856.44, which said amounts were paid by Petitioner under written protest on December 22, 1941 (Petitioner's App. 26).

An Appeal from this action by Respondent was filed with and heard by the Board of Tax Appeals for the District of Columbia (Petitioner's App. 32).

(b) Tax Liability Under "Gross Receipts Statute".

Effective for the fiscal year 1941 Congress, by the Act of July 26, 1939, repealed the "Gross Earnings Statute" above referred to and imposed upon Petitioner a tax of four per cent. (4%) of its "gross receipts from the sale of public utility commodities and services within the District of Columbia."

Petitioner, in its original return of gross receipts as the basis for taxes for the fiscal year 1941, included all gross receipts from public utility business begun and completed within the District of Columbia, but did not include gross receipts from interstate business (Petitioner's App. 27).

The items of gross receipts excluded by Petitioner from its original return, which for the year involved amounted to \$1,435,787.31, consisted of revenues from telephone business crossing the District of Columbia line, that is to say, telephone calls originating within the District and terminating outside the District, and calls originating outside and terminating within the District, and calls originating and terminating outside but routed through the District of Columbia (Petitioner's App. 29, 30, 31).

The various types of telephone business making up the total interstate gross receipts excluded from the Petitioner's original return and the amounts received from each appear in detail in the Findings of Fact of the Board of Tax Appeals for the District of Columbia (Petitioner's App. 29, 30, 31). In all cases the interstate gross receipts represent the services performed by Petitioner's employees or plant within the District of Columbia in connection with telephone calls in interstate commerce. In each instance the completed telephone call is made by a combination of the facilities of the Petitioner and some other telephone company operating outside of the District of Columbia (Petitioner's App. 29, 30, 31).

On April 25, 1941 Petitioner was required by Respondent to file a revised return of gross receipts, including therein as taxable the interstate gross receipts above described, omitted from its original return. On November 17, 1941 such revised return was filed. Respondent assessed additional gross receipts taxes and penalties against Petitioner in the total amount of \$58,443.99, which were paid by Petitioner under written protest on December 22, 1941 (Petitioner's App. 32).

An appeal from this action by Respondent was filed with and heard by the Board of Tax Appeals for the District of Columbia (Petitioner's App. 32).

(c) Decision by the Board of Tax Appeals and Appeal to United States Court of Appeals for the District of Columbia.

The Board of Tax Appeals for the District of Columbia by decision dated September 10, 1942 affirmed the action of the Respondent in respect to the tax liability of the Petitioner for the fiscal years 1939, 1940 and 1941, as above described, and as provided by law (52 Stat. 370) Petitioner filed its Petition for Review by the United States Court of Appeals for the District of Columbia.

STATUTES.

The relevant part of the Act of July 1, 1902 (32 Stat. 619) referred to herein as the "Gross Earnings Statute" which is involved in this proceeding is contained in Par. 5 of Sec. 6, and is as follows:

"Each national bank as the trustee for its stockholders, through its president or cashier, and all other incorporated banks, and trust companies, in the District of Columbia, through their presidents or cashiers, and all gas, electric lighting, and telephone companies, through their proper officers, shall make affidavit to the board of personal-tax appraisers on or before the first day of August each year as to the amount of its or their gross earnings for the preceding year ending the thirtieth day of June, and shall pay to the collector of taxes of the District of Columbia per annum on such gross earnings as follows: Each national bank, and all other incorporated banks, and trust companies, respectively, six per centum; each gas company, five per centum; each electric lighting, and telephone company, four per centum."

The relevant parts of the District of Columbia Revenue Act of 1939 (The Act of July 26, 1939—53 Stat. 1107) referred to herein as the "Gross Receipts Statute" which is involved in this proceeding is contained in Sec. 2(a) of Title IV, and is as follows:

"Each national bank as the trustee for its stockholders through its president or cashier, and all other incorporated banks, and trust companies, in the District of Columbia, through their presidents or cashiers, and all gas, electric lighting, and telephone companies, through their proper officers, shall make affidavit to the board of personal-tax appraisers on or before the first day of August each year as to the amount of its or their gross earnings or gross receipts, as the case may be, for the preceding year ending the 30th day of June, and each national bank and all other incorporated banks and trust companies respectively shall pay to the collector of taxes of the District of Columbia per annum 6 per centum on such gross earnings and

each gas company, electric lighting company, and telephone company shall pay to the collector of taxes of the District of Columbia per annum 4 per centum on such gross receipts, *from the sale of public utility commodities and services within the District of Columbia.*" (Emphasis supplied.)

STATEMENT OF POINTS.

Petitioner's statement of points respecting each of the statutes involved are as follows:

(a) Re: "Gross Earnings Statute".

1. The term "gross earnings" as used in this statute should properly exclude the raw material cost of a tangible commodity (telephone directory) which Petitioner furnishes its customers as a part of its service. Such raw material costs represent an outlay of capital and until capital is recovered there can be no "gross earnings". *District of Columbia v. The Georgetown Gas Light Company*, 45 App. D. C. 63, XLIV Wash. L. R. 258.

2. The department of the government of the District of Columbia charged by law with the duty of administering the "gross earnings statute" has for a period of approximately ten years interpreted this law so as to permit the deduction by Petitioner of directory raw material cost. This interpretation has a reasonable basis both in law and fact and has the force and effect of law.

(b) Re: "Gross Receipts Statute."

1. The "Gross Receipts" statute confined the tax to "gross receipts from the sale of public utility commodities and services *within the District of Columbia.*" The "Gross Earnings" statute which was repealed by this law was not confined to business done within the District of Columbia. Congress added this restrictive phrase "within the District of Columbia" as descriptive of business taxed in order to eliminate interstate receipts from the base of the tax and

used words that have consistently been held to include only local business.

2. The "Gross Receipts Statute" does not contain allocation provisions, which is customary, if not necessary, in statutes taxing interstate as well as local receipts. The same Act imposing the gross receipts tax levied a tax on all corporations upon net income from District of Columbia sources and directed the Commissioners of the District of Columbia to promulgate regulations containing formulas of allocation in order to determine the tax liability of a corporation engaged in both interstate and local business. It is reasonable to assume that Congress would have incorporated a similar provision in the "gross receipts" section had Congress intended that it include interstate gross receipts, or else would have made no change in the "gross earnings statute" in this respect since it had been held to include all revenues.

SUMMARY OF ARGUMENT.

(a) Re: "Gross Earnings Statute."

Petitioner is engaged in the business of furnishing telephone service and in connection therewith furnishes its subscribers with a telephone directory to assist them in the use of the service. Since 1931 Respondent has permitted Petitioner in its return of "gross earnings" to deduct from the taxable base the raw material costs of directories and a provision was inserted on the return for that purpose. The basis for this interpretation was the decision of the Court of Appeals for the District of Columbia in the *Georgetown Gas Light Co.* case, *supra*. In that case the Court held that a gas company was permitted to deduct from its revenues in arriving at "gross earnings" the cost of raw material consumed in the manufacture of gas. Petitioner argues that the reasons advanced by the Court in that case support its claim to deduction of directory raw material costs.

Petitioner further contends that even in the absence of the support of the *Georgetown Gas Light Company* case

Respondent will not now be heard to reverse an administrative interpretation made by it and having a reasonable basis, since the interpretation has been continued for a long period of time and can not now be reversed without serious detriment to Petitioner.

(b) Re: "Gross Receipts Statute."

The sole question involved in this phase of this appeal is determining what Congress intended by adding the restrictive phrase "within the District of Columbia" as descriptive of businesses taxed. Petitioner takes the position that Congress intended to exclude receipts from interstate business, whereas Respondent believes that this restrictive phrase has no meaning when applied to the business of Petitioner and that all of its receipts, both local and interstate, are taxable under this statute.

The Board of Tax Appeals held that this company's interstate receipts were embraced in the tax, basing its opinion entirely on the proposition that Congress has the power to tax interstate receipts for the benefit of the District of Columbia, and apparently assumed that the power was exercised in this instance. Petitioner believes that the problem is one of determining Congressional intent, not power, and for the following reasons is of the opinion that the findings of the Board of Tax Appeals for the District of Columbia do not correctly reflect the intent of Congress:

1. The words used by Congress, "service within the District of Columbia", clearly imposes a tax on gross receipts from business with a District of Columbia situs and not gross receipts from property with a District of Columbia situs.

2. The District of Columbia Revenue Act of 1939, which restricted the gross receipts levy to local business also contained a corporate net income tax and thus Congress was able to make a desirable restrictive change in the gross levy without diminishing the tax receipts of the District of Columbia.

3. The decisions and opinions under the "gross earnings statute" clearly indicate that had that statute been restricted to gross earnings from business within the District of Columbia, Petitioner's interstate gross earnings would not have been taxable. From these rulings it logically follows that interstate receipts are excluded from the "gross receipts statute" since it is restricted to gross receipts from services "within the District of Columbia."

4. The Supreme Court of the United States as well as various state courts have interpreted similar restrictive phrases in state statutes to include only business completely performed within a state.

5. The District of Columbia and the state statutes imposing taxes on interstate revenues do so in clear and unmistakable terms. In none of the decisions is there a question of legislative intent. The "gross receipts statute" does not clearly and unmistakably embrace Petitioner's interstate gross receipts.

ARGUMENT.

(a) Re: "Gross Earnings Statute."

The Act of July 1, 1902 does not define "gross earnings." The Court of Appeals for the District of Columbia defined this term in the *Georgetown Gas Light Company* case, *supra*. The Assessor for the District of Columbia, beginning with the fiscal year 1931 and continuing through the two fiscal years here involved, 1939 and 1940, furnished Petitioner with forms for making gross earnings reports, which forms contained a space for the deduction of directory raw material costs. (Petitioner's App. 25.) There is nothing in this record that reveals how this practice was started but it may be assumed that the above case was the basis of the practice, since it is the only recorded decision that deals with the term "gross earnings" as used in this statute.

In the *Georgetown Gas Light Company* case the taxpayer had deducted from its gross receipts the cost of raw mate-

rial consumed in the manufacture of gas and reported the resulting figure as gross earnings. The District of Columbia disallowed this deduction on the theory that "gross receipts" and "gross earnings" were synonymous. The Court held that the two terms were not synonymous, and that the Gas Company under the law had the right to deduct the cost of raw materials consumed in the manufacture of gas. The reasoning of the Court is contained in the following paragraphs taken from the opinion of Mr. Chief Justice Covington:

"Taking paragraph 5 of section 6 of the act of July 1, 1902, in its ordinary sense, it is certainly free from ambiguity. It taxes national banks, other incorporated banks, trust companies, gas companies, electric lighting companies and telephone companies upon their 'gross earnings.' It taxes street railroad companies and insurance companies upon their 'gross receipts.' There is a full recognition by the Congress of a distinction between 'gross receipts' and 'gross earnings.' Is not that distinction as expressed in this statute a natural and sensible one? Take the case of a bank which lends \$100,000 of its capital stock on the first day of January, and receives back its \$100,000 plus \$3,000 in interest on the first day of July. It certainly could not have been intended to treat the 'gross receipts' of \$103,000 as 'gross earnings', for if that should be so, the tax upon those 'gross receipts' as equivalent to 'gross earnings' would be \$5,150, or nearly twice as much as the actual interest or profits received. It is obvious then that the expression 'gross earnings,' when applied to the bank, must mean the gross amount earned from the use of its capital, or the use of such money on deposit with it as it is entitled to treat in the same manner for investment as it does its capital. *And if 'gross earnings' does not mean 'gross receipts' when applied to the bank, of course it can not mean 'gross receipts' when applied to the manufacturing corporation engaged in the production and sale of gas. The one term is applied to both of them to measure their personal taxes, and it must consequently be applied with the same meaning.*" (Emphasis supplied)

* * * * *

“In fact, all of the federal cases cited by the appellant, excepting two (and neither of those affecting the point in issue here), were cases in which railroads and their receipts or earnings were involved, and therein lies the misconception of the appellant in this case. It may very well be that ‘gross earnings’ and ‘gross receipts’ constitute precisely the same sum of money with certain sorts of business concerns. *A railroad company engaged entirely in the rendition of services for which it receives compensation, and neither producing nor furnishing any tangible commodity to persons as an incident to the rendition of the services, may have as its ‘gross receipts’ and its ‘gross earnings’ precisely the same moneys. But, it does not follow that every concern will have as its ‘gross receipts’ and its ‘gross earnings’ precisely the same thing.*” (Emphasis supplied)

As the Court held in this case, the term “gross earnings” should have the same meaning when applied to all businesses taxed on their “gross earnings.” (See italicized portions of first quotation) This is the contention of Petitioner. Petitioner is engaged in the furnishing of telephone service, but as a necessary incident to such service it furnishes a commodity to its subscribers, that is to say, a telephone directory. The items deducted are the bare costs of raw material—paper, printing, binding and transportation. Petitioner has not deducted the wages and salaries of its employees who assemble and prepare the directory before printing, the cost of distribution, amounts paid for soliciting advertisement, and other miscellaneous costs in connection with directory activities. These last-mentioned or so-called operating costs, upon which taxes were paid on the basis of Petitioner’s original returns, amounted to \$90,769.92 in 1939 and \$97,527.14 in 1940. (Petitioner’s App. 25.)

Reference is made to the last two sentences of the opinion of Mr. Chief Justice Covington, above cited, wherein he states that “gross receipts” and “gross earnings” may amount to precisely the same moneys in the case of a railroad that is engaged entirely in the rendition of service

and neither produces nor furnishes a tangible commodity to its customers as an incident to such service. The Chief Justice goes on to say that it does not follow that "gross receipts" and "gross earnings" are precisely the same as applied to other types of businesses. The criterion seems to be whether or not the taxpayer produces or furnishes a tangible commodity as a part of its business, and, if so, the cost of raw material for such commodity is a proper deduction in determining "gross earnings."

The Board of Tax Appeals for the District of Columbia follows the reasoning of the Petitioner to this point but concludes that directory raw material costs are not proper deductions because the telephone directory is not a "tangible commodity" as contemplated in the opinion of the Court of Appeals. This conclusion is based on the following findings of fact by the Board:

"The petitioner is engaged in supplying telephone service. It is not in the business of selling, nor does it sell telephone directory books. Such books are furnished as an essential aid to its service, without which the service would be practically useless. The books belong to it, and are delivered to the subscribers under a bailment. True, its money, and perhaps some of its capital is expended in compiling the information contained in the directory, in procuring the directory from the Western Electric Company and in distributing it to its subscribers, but the same is true in respect of the purchase of the transmitters, receivers and other equipment left with the subscribers, and of the payment of other necessary expenses of operation, all of which is expected to be returned out of the receipts from telephone service to the subscribers. Of course, the directory and the equipment left with the subscriber differ, in that the replacement of the former is by far more frequent than that of the latter, but the difference is in degree only and is not essential. (Petitioner's App. 38)

"The directory is not, as the petitioner contends, 'a tangible commodity' furnished to persons as an incident to the rendition of the services. It is 'tangible', but is not a 'commodity' in the sense used in the

Georgetown Gas Light Company case. That is clear from a reading of the opinion in that case. The Court of Appeals, through Mr. Chief Justice Covington, had in mind the ordinary acceptation of that term when used in relation to commerce, namely, a moveable that is bought and sold. To follow the petitioner's argument logically would lead to the conclusion that in computing gross earnings the petitioner could deduct the cost of the telephone equipment left with the subscriber, the electric and gas light companies the cost of electric and gas meters; and the street railway company the cost of tickets, since each of such is something 'tangible' furnished 'persons as an incident to the rendition of the services.' Examples could be multiplied, but enough have been cited to show the fallacy of the petitioner's argument." (Petitioner's App. 38, 39)

According to the Board, as appears from the foregoing, the following facts distinguish the Petitioner's case from that of the Gas Company in the *Georgetown Gas Light Company* case—

(1) Petitioner is not in the business of selling, nor does it sell directories; (2) directories are the property of Petitioner and are delivered to subscribers under a bailment, and hence are no different from transmitters, receivers and other equipment left with subscribers and returned upon discontinuance of service; and (3) the directory is not a commodity within the meaning of the *Georgetown* decision.

As to (1) we do not believe that it is material whether Petitioner sells the commodity in order to be entitled to deduct its raw material costs. It can not be denied that Petitioner furnishes its subscribers with directories and in the *Georgetown Gas Light Company* case the Court found that a utility producing or furnishing a tangible commodity to its customers is entitled to a deduction of raw material costs in arriving at "gross earnings."

As to (2) there was nothing in the record before the Board to justify this finding. Each subscriber is furnished a directory but there is no contract, express or implied,

between the Company and the subscriber. When a new directory is issued the Company attempts to collect obsolete directories so as to eliminate future confusion. The salvage value realized is infinitesimal. The Board's comparison of directories with transmitters, receivers and other equipment is also erroneous. Transmitters, receivers and all other telephone equipment are a part of Petitioner's plant upon which its rates are based and are rented to subscribers. This is obviously not true of directories.

As to (3) that the directory is not a commodity within the meaning of the Court of Appeals decision, we feel that this is a deduction unwarranted by the facts.

The statute imposing this gross earnings tax on telephone companies levies in the same paragraph a similar tax on all national banks and all other incorporated banks or trust companies and all gas and electric light companies, the only variation being in the rate of the tax. A bank is certainly not a manufacturing concern, nor does it have a manufactured commodity for sale. The Court points out in the *Georgetown Gas Light Company* opinion that if a bank made a loan of \$100,000 on January 1st and received back its \$100,000, plus \$3,000 interest on July 1st, its "gross receipts" would be \$103,000, but its "gross earnings" would only be \$3,000, because "gross earnings" means the gross amount received from the use of capital. The Court goes on to say that since the term "gross earnings" is the basis of the tax of both the bank and the Gas Company it should have the same meaning when applied to both, and thus the Gas Company should be permitted to deduct its return of capital when arriving at "gross earnings."

The principle of this case is, that "gross earnings" means "return on capital" and not "return of capital" and that where a company subject to the provisions of the Act in question is required to purchase material which is consumed in the manufacture of a tangible commodity which it furnishes its patrons, such cost must necessarily be deducted from "gross receipts" to arrive at "gross earnings" because that portion of "gross receipts" which equals

the cost of the raw materials represents a return of capital outlay and does not represent earnings.

In addition to the foregoing it is submitted that Respondent cannot as a matter of law reverse its long continued interpretation of the statute involved. From 1931 through 1940 Petitioner made its reports or returns of gross earnings on forms furnished it by Respondent for that purpose, and it is evident that Respondent expected Petitioner to deduct directory raw material costs as a space was provided for that purpose and the reports or returns were accepted without question by Respondent. (Petitioner's App. 25)

Petitioner is aware of the fact that the wrongful interpretation of a statute, that is, an interpretation without reasonable statutory support, no matter how long continued, will not defeat the obvious intent of law. The interpretation of the statute here involved, which was promulgated by the Respondent for a period of ten years prior to April 25, 1941 (Petitioners App. 25) was not without reasonable statutory support. Prior to April 25, 1941, Respondent interpreted this statute so as to permit the deduction of directory costs because of the decision of the Court in the *Georgetown Gas Light Company* case or else it would not have issued an official form containing a space for the deduction of such costs.

A principle of law firmly embedded in the very concept of jurisprudence is the requirement of certainty in all statutes, and this is especially true of statutes levying taxes and imposing penalties for noncompliance. It is an equally well-settled principle of law that the construction placed upon a statute by those charged with the duty of enforcement should not be disregarded except for the most cogent reasons. This general rule of law is stated in 59 C. J. 1025 to be as follows:

“The contemporaneous construction placed upon a statute by the officers or departments charged with the duty of executing it is entitled to more or less weight, especially if such construction has been made by the

highest officers in the executive department of the government or has been observed or acted upon for a long period of time; and, while not generally controlling, where the case is not extreme and no vested rights are involved, such construction should not be disregarded or overturned except for the most cogent reasons, and unless clearly erroneous." (Pages 1025, 1026)

It is submitted that there are no cogent reasons which would permit the Respondent to reverse its long continued interpretation of the Act of July 1, 1902, but on the contrary there are cogent reasons, both in law and in fact, why the interpretation should stand.

In *United States v. Alabama Great Southern Railroad Company*, 142 U. S. 615, the Supreme Court held that the executive department of the federal government could not change its interpretation of a statute where parties who had acted on the faith of the old construction might be injured. A brief synopsis of the facts involved in this case is contained in the second syllabus, as follows:

"The postal appropriation act of July 12, 1876, c. 179, fixed a rate of pay to railroads for carrying the mails, and provided that roads constructed in whole or in part by a land grant, conditioned that mails should be transported at a rate to be fixed by Congress, should receive only 80 per cent of that rate. As applied to a line of road a part of which only was constructed with such aid, the department held, and acted in accordance therewith for many years, that it was entitled to the percentage pay for the portion of the line so constructed and to full pay for the remainder. Subsequently, the Department reversed this construction, and claimed that the mails should be carried over the whole line at the reduced rate, and it accordingly withheld from sums due for current transportation not only the 20 per cent thereon, but a sufficient amount to settle claims for past transportation on that basis. The railroad company sued to recover the pay withheld. The Court of Claims gave judgment in its favor, and this court affirms that judgment."

In this case Mr. Justice Brown, speaking for a unanimous Court, states the basis for the opinion in the following words:

“We think the contemporaneous construction thus given by the executive department of the government, and continued for nine years through six different administrations of that department—a construction which, though inconsistent with the literalism of the act, certainly consorts with the equities of the case—should be considered as decisive in this suit. It is a settled doctrine of this court that, in case of ambiguity, the judicial department will lean in favor of a construction given to a statute by the department charged with the execution of such statute, and, if such construction be acted upon for a number of years, will look with disfavor upon any sudden change, whereby parties who have contracted with the government upon the faith of such construction may be prejudiced. It is especially objectionable that a construction of a statute favorable to the individual citizen should be changed in such manner as to become retroactive, and to require from him the repayment of moneys to which he had supposed himself entitled, and upon the expectation of which he had made his contracts with the government. These principles were announced as early as 1827 in *Edwards’ Lessee v. Darby*, 12 Wheat. 206, 210, and have been steadily adhered to in subsequent decisions. *United States v. State Bank of North Carolina*, 6 Pet. 29, 39; *United States v. Macdaniel*, 7 Pet. 1; *Brown v. United States*, 113 U. S. 568; *United States v. Moore*, 95 U. S. 760, 763.” (Page 620)

This early decision of the Supreme Court has been cited as controlling in many later cases. Reference is made to the following:

United States v. Healey, 160 U. S. 136.

United States v. Cerecedo Hermanos, etc., 209 U. S. 337.

Hawley v. Diller, 178 U. S. 476.

Copper Queen Consolidated Mining Co. v. Arizona, 206 U. S. 476.

United States v. Jackson, 280 U. S. 183.

Luckenbach Steamship Co. v. U. S., 280 U. S. 173.

In more recent years the Court has strengthened this principle of law concerning construction of statutes by holding that the construction of a statute by the Department charged with its enforcement and accepted for a long period of years becomes a part of the law the same as though it were written on the statute books. In the recent case of *Nashville, Chattanooga & St. Louis Railway v. Browning et al*, 310 U. S. 362 (1940), the taxpayer was complaining of the manner in which its properties were assessed and taxed in Tennessee and the Court held that since the railway had been assessed in this manner for more than forty years the procedure became a part of the law of Tennessee just as if it were written on the statute books. In this case, the railway proved that its properties were assessed at about true value and had been so assessed for years, whereas private property owners were assessed at considerably less than true value, although the Tennessee Constitution required all taxes to be on an equal and uniform basis. Mr. Justice Frankfurter, in upholding the assessment, makes the following statement:

“Here, according to petitioner’s own claim, all the organs of the state are conforming to a practice, systematic, unbroken for more than forty years, and now questioned for the first time. It would be a narrow conception of jurisprudence to confine the notion of ‘laws’ to what is found written on the statute books, and to disregard the gloss which life has written upon it. Settled state practice cannot supplant constitutional guarantees, but it can establish what is state law. The Equal Protection Clause did not write an empty formalism into the Constitution. Deeply embedded traditional ways of carrying out state policy, such as those of which petitioner complains, are often tougher and truer law than the dead words of the written text.”
(Page 369)

These decisions of the Supreme Court clearly support the position of Petitioner.

Reference is again made to *United States v. Alabama Great Southern Railroad Company, supra*, in which the U. S. Supreme Court would not permit an executive department of the Federal Government to reverse its interpretation of a statute which had been continued for a period of nine years although the interpretation was inconsistent with the literalism of the Act, primarily because rights had become vested on the basis of the old interpretation. Mr. Justice Brown makes the following observation in this respect:

“* * * It is especially objectionable that a construction of a statute favorable to the individual citizen should be changed in such manner as to become retroactive, and to require from him the repayment of moneys to which he had supposed himself entitled, and upon the expectation of which he had made his contracts with the government * * *.”

This reasoning of the Court should be borne in mind in the consideration of Petitioner's position in this connection. Petitioner is a regulated public service corporation and its rates for telephone service are established by a governmental regulatory body. The taxes and penalties on directory costs, which for the years here involved amounted to \$20,081.56, were not treated as expenses for these years and hence were not recovered by Petitioner through its rates for telephone service. Respondent is now requiring Petitioner to make payment of taxes for the fiscal years 1939 and 1940 after acquiescing for a period of about ten years in a statutory interpretation that would not require such payment. It is submitted that the equities of the situation as well as the law strongly favor Petitioner.

In view of the foregoing it is submitted that the action of the Assessor in collecting gross earnings taxes for the fiscal years 1939 and 1940 from Petitioner computed on directory raw material costs, which action was affirmed by the Board of Tax Appeals for the District of Columbia, was not in accord with the law, and that the judgment of the Board should be reversed and the Petitioner be entitled to a re-

fund of \$20,081.56, being the amount of taxes and penalties paid under protest by Petitioner.

(b) Re: "Gross Receipts Statute".

As stated in the Summary of Argument the sole question here involved is determining what Congress meant by confining the gross receipts levy to "gross receipts from the sale of public utility commodities and services within the District of Columbia."

Petitioner argues that this restrictive phrase was added to eliminate gross receipts from interstate commerce. The revenues involved consist of Petitioner's share of charges for interstate telephone service furnished by its facilities in conjunction with the facilities of some other Company. While the interstate business of Petitioner consists of many different varieties, two examples will amply illustrate the type of interstate gross receipts here involved—*first*—a call from Washington to New York City is made by a Washington customer. Petitioner furnishes the telephone and the other exchange facilities to connect with the long lines circuits of the American Telephone and Telegraph Company. The message is transmitted over these circuits to the central office in New York City and from there over the exchange facilities of another company to the called party. In this situation Petitioner makes the charge for the call, collects it, retains a portion thereof for its services and remits the balance to the American Telephone and Telegraph Company, *second*—a call from Washington to Baltimore is made by a Washington subscriber. Here the Petitioner also furnishes the telephone and the other exchange facilities and in addition the message is transmitted to the District of Columbia line over circuits of Petitioner and from there to the called party over circuits of another company. Here the Petitioner also makes the charge, collects it, retains a portion for its services and remits the balance to the other company.

The Board took the position that these revenues were gross receipts from "services within the District of Columbia" and hence were within the plain language of the statute, and furthermore, that such a statute was constitutionally sound. The Board in its opinion does not consider what Congress might have intended by this statute, but apparently assumes that Congress was including all gross receipts that came within its taxing powers.

Title IV, Sec. 2(a) of the District of Columbia Revenue Act of 1939, which is called herein the "Gross Receipts Statute," has not been considered by the Courts. In the absence of decisions as to the meaning of the new "gross receipts statute" it would appear first desirable to consider the administration and interpretation of the "gross earnings statute" which was repealed by the "gross receipts statute" to determine whether there were any consequences of that Act that Congress may probably have intended to correct or change by the passage of the "gross receipts statute".

The first change effected by the new statute was the substitution of "gross receipts" for "gross earnings." This was obviously done in order to place the four major utilities operating in the District of Columbia on the same basis, since under the decision in the *Georgetown Gas Light Co.* case, *supra*, utilities producing or furnishing a commodity were entitled to deduct the cost of raw material in determining "gross earnings," while utilities furnishing only service did not have the benefit of any such deduction. This change in the law has been recognized by Respondent.

The second change effected by the new statute concerns the type of revenues treated as taxable. The gross earnings statute was not confined to operating gross earnings, but had been held to include all gross earnings whether from rent, interest, dividends or any other sources (reference is made to the decision of the Court of Appeals of the District of Columbia in *Potomac Electric Power Co. v. Rudolph*, 58 App. D. C. 261, 29 Fed. (2d) 634, certiorari de-

nied, 278 U. S. 656. The underlying theory in support of this gross earnings tax on utilities was that utilities enjoyed a franchise or right not accorded or used by other business concerns and should rightfully be taxed on the earnings from that privilege or should be subject to a tax measured by the earnings from such privilege. Dividends, interest and similar income items are not utility earnings and hence should not be subject to a utility tax so long as other concerns (non-utility) that receive the same type of income are not required to pay a tax thereon. Consequently the new gross receipts tax was specifically confined to gross receipts from the sale of public utility commodities and services, thus eliminating such nonoperating items as were held to be taxable under the gross earnings statute. Respondent has also recognized this change in the law.

The third change brought about by Title IV of the District of Columbia Revenue Act of 1939 was the addition of the restrictive phrase "within the District of Columbia" as descriptive of the type of business taxed. The gross earnings statute was not confined to gross earnings from business done within the District of Columbia, and the Court of Appeals of the District of Columbia in *Potomac Electric Power Company v. Hazen*, 67 App. D. C. 161, 90 Fed. (2d) 406, certiorari denied, 302 U. S. 692, held that the Act was intended to embrace earnings from all sources, that is to say, both interstate as well as local.

As to this third change Petitioner argues that Congress made this addition to the law in order to exclude interstate revenues whereas Respondent takes the position that in so far as Petitioner is concerned this restrictive phrase has no meaning because all of its properties are located within the District of Columbia.

Before proceeding with Petitioner's argument in support of its position it may be well to consider briefly the view of Respondent as affirmed by the Board. As before stated the Board held that the gross receipts tax embraced gross

receipts from "services within the District of Columbia" and since all of Petitioner's plant is located within the District of Columbia, then it follows that all of its gross receipts are subject to the tax. It appears that the Board is confusing situs of property with situs of business. The Act in question does not impose a tax on the gross receipts from property within the District but imposes a tax on gross receipts from the sale of public utility commodities and services within the District of Columbia. A telephone call from Washington to New York City does not have a District situs. It is submitted that the Board did not arrive at the true meaning of the words used in the statute.

In order to establish Petitioner's position that the restrictive phrase was for the purpose of eliminating interstate gross receipts there are two questions that immediately appear for consideration. *First*—were there any factors that might have prompted Congress to reduce the gross receipts tax liability of Petitioner and other utilities by restricting the tax to local revenues? and *Second*—Did the words used in the statute accomplish this purpose?

As to the first question—both the old "gross earnings statute" and the new "gross receipts statute" impose a license tax for the privilege of conducting a local business. The Court of Appeals of the District of Columbia held that the "gross earnings statute" included gross earnings from interstate business because there were no words of exclusion. Congress, when legislating for the District of Columbia, acts in the role or capacity of a state legislature, and while its powers are considerably more extensive than those of a state legislature it is not reasonable to assume that the Congress would attempt to legislate in favor of the District under its extensive or national powers. It is not reasonable to suppose that Congress intended that any business in the District of Columbia should pay to the District of Columbia a tax for the privilege of engaging in interstate commerce. It would certainly appear more logical to assume that Congress would confine local taxes to local busi-

nesses. This restriction does reduce Petitioner's gross receipts tax liability as compared with its liability under the "gross earnings statute." However, the District of Columbia Revenue Act of 1939 which contains the "gross receipts statute" also imposes a 5 per cent net income tax on the net income of all corporations from District of Columbia sources, so that the Petitioner's tax liability to the District of Columbia was increased rather than reduced by the District of Columbia Revenue Act of 1939. In other words, this legislation modified the gross levy so as to make same accord with a logical pattern and was able to do this without loss of revenue to the District of Columbia by including in the same Act a net income levy.

The second question, namely, do the words used accomplish the purpose above advanced, is answered by reference to decisions involving the same or similar words in this and other jurisdictions.

In *Potomac Electric Power Co. v. Hazen, supra*, the Power Company contended that the "gross earnings statute" did not embrace its gross earnings from the sale of electricity generated within the District of Columbia and sold in Maryland and from the rental of property located in Maryland.

The Power Company argued that the tax was a local tax and intended to have local operation only, and furthermore, that a tax upon the Company's interstate business was a burden on interstate commerce and therefore unconstitutional.

The Court of Appeals for the District of Columbia disposed of the constitutional question by finding that the tax was a franchise tax measured by gross earnings and as such constitutionally sound. As to whether Congress intended that a local law have more than local operation, the finding of the Court is stated in the following extract from the opinion of Mr. Associate Justice Robb:

"* * * The language of paragraph 5 of section 6 of the act of 1902, as amended, is not ambiguous. It provides for an affidavit by each utility company within

its terms 'as to the amount of its or their gross earnings,' and requires the payment of a tax measured on such gross earnings. The statute is all inclusive—covering gross earnings from whatever source. Under the act of 1902 street railroad companies were required to pay tax on their gross receipts generally and without restriction. *But by the amendment of 1904 Congress narrowed the scope of the railroad tax to gross receipts within the District, thereby plainly evincing an intent to maintain or continue in force the broad scope of the tax imposed on the other utilities covered by the act.* There being no violation of the Constitution, Congress of course may select the subjects of taxation and tax them differently as it sees fit. *Crooks v. Harrelson*, 282 U. S. 55, 6, 51 S. Ct. 49, 75 L. Ed. 156; *Lang v. Commissioner*, 289 U. S. 109, 113, 53 S. Ct. 534, 77 L. Ed. 1066.” (Emphasis supplied)

The Court was of the opinion that all of its receipts were taxable because the statute was all-inclusive. The Court pointed out that by the amendment of 1904 Congress narrowed the scope of the railroad tax to “gross receipts from within the District” and thereby evinced an intention to maintain the broad scope of the tax imposed on other utilities subject to the Act. It is evident that the Court would have permitted the Power Company to deduct its interstate receipts had the Congress, by the amendment of 1904, added the same restrictive phrase to the section of the law imposing its tax as it had added to the section of the law imposing the railroad tax.

Respondent may argue that in the *Power Company* case the Court was considering the taxability of gross earnings from the sale of electricity in the State of Maryland and from rent of land, buildings and equipment within that State, and that while Petitioner’s argument as above stated may be true as respects such revenues as were involved in that case it would not follow that Petitioner’s interstate revenues are exempt because all of its properties are within the District. This line of argument is based on a misconception of the opinion in the *Power Company* case, and a

complete misunderstanding of Title IV of the District of Columbia Revenue Act of 1939. In the first place, a part of the revenues involved in the *Power Company* case were from the sale of electricity generated in the District of Columbia and sold outside the District, hence it could not rightfully be said that all of the revenues involved were derived from properties located outside the District. In the second place, the theory of the Power Company's argument in this case was that the District's interpretation of the Act of 1902 created an unreasonable burden on *interstate commerce*, and it was not likely that Congress would attempt to regulate a matter of national concern in a law passed solely for and limited to the District of Columbia. It was necessary for the Court to dispose of this argument in arriving at its decision—the location of the property had no bearing on the question involved in this case. Likewise, the situs of the property should have no bearing on the question here involved, because Title IV does not even contain the word "property." The tax is imposed on gross receipts from "the sale of public utility commodities and services," which is, of course, synonymous with "public utility business"; hence, the "situs of business" should control and not "situs of property," and since the law specifically covers only gross receipts from business having a situs "within the District of Columbia" it cannot properly be interpreted to include interstate business because its situs is not the District of Columbia but consists of every State through which it passes. Business may either have a local or interstate situs and it appears reasonable to assume that Congress attempted to tax only local business because it confined the tax to business done "within the District of Columbia."

Prior to the decision in the *Power Company* case this Company requested a ruling from the District of Columbia respecting the taxability of its interstate receipts under the Act of 1902. The Company was furnished copy of ruling by the Honorable F. H. Stephens, then Corporation Counsel for the District of Columbia, dated May 6, 1926, wherein

the Assessor was advised that the statute did embrace this Company's interstate receipts, because it was not confined to business done within the District of Columbia. There follows a copy of this ruling of the Corporation Counsel:

"BOARD OF PERSONAL TAX APPRAISERS

District of Columbia

Washington

Room 103
Municipal Building

May 6, 1926.

COPY

To the Commissioners:

I return herewith the papers in the A. O. No. 62705, (C. C. O. 13050/3) referred to this office at the request of the Assessor, for opinion upon the question whether revenues from toll messages to points outside the District of Columbia, and revenue from leased toll lines, should be included in the gross earnings of the Chesapeake and Potomac Telephone Company for the purposes of taxation as provided in the Act of July 1, 1902. Paragraph 5 of the Act in question imposes a tax of 4 per cent per annum on the gross earnings for the preceding year on telephone companies.

The company, through its counsel, has submitted a brief upon this question which has been carefully considered. It is argued that the tax cannot include revenue from toll messages to points outside of the District of Columbia because this is interstate commerce. Numerous cases are cited in the brief of counsel to the effect that a State has no power to tax interstate commerce. This point is conceded. In the present case, however, we are not dealing with the power of States, but with the power of Congress, which can, under the Constitution, tax interstate commerce.

The question in the present case, therefore, is not whether Congress has the power to tax toll revenues derived from interstate commerce, but whether it has done so in the present law. The point is argued by counsel as if the tax were a tax upon property. It is, however, not a tax upon property, but is a special franchise or excise tax measured by the amount of gross

earnings, and whatever constitutes part of those gross earnings, must be included in computing the tax. This point is expressly decided in *Security Savings and Commercial Bank v. District of Columbia*, 51 Appeals 316. In that case it was contended that interest derived from Government Bonds, Liberty Bonds, War Savings Stamps and certificates of indebtedness to the United States, which under the law providing for their issuance, are exempt from taxation, could not be taxed as gross earnings. This was conceded to be true if the tax were a property tax, not if it were a franchise tax. The Court of Appeals held that the tax in question was a franchise or excise tax and the interest from the Government securities mentioned were properly included in the gross earnings of the bank. There are **numerous cases in the Supreme Court of the United States** sustaining the rule announced by the Court of Appeals.

It is to be noted that paragraph 5, under which the tax is laid, was amended by the Act of April 28, 1904, 33 Stat. 560, as to street railroad companies confining the tax on their gross receipts 'within the District of Columbia.' There is no such provision as to the other class of corporations mentioned in that paragraph. (Emphasis supplied)

Should the company desire to make a test of the question it should be required to pay the tax under protest and then bring a suit for recovery of the taxes so claimed to be illegally exacted. I am enclosing herewith a copy of my brief in the case of the Security Savings and Commercial Bank, above noted, for the information of the company.

I am of the opinion that revenues from toll messages to points outside the District of Columbia, and revenues from leased toll lines, should be included in the gross earnings for purposes of taxation.

(S) F. H. Stephens,
Corporation Counsel, D. C.

gg.

Approved May 7, 1927.

Cuno H. Rudolph."

From the italicized portions of this opinion it appears that the Corporation Counsel's interpretation of the Act

of 1902 was determined in the same manner as the interpretation of the Court of Appeals in *Potomac Electric Power Co. v. Hazen*, *supra*. The Corporation Counsel likewise makes no reference to the location of the plant involved.

It may be noted that the opinion of the Board of Tax Appeals relating to the "gross receipts tax" failed to mention either the *Power Company* case or the above opinion of the Corporation Counsel concerning the "gross earnings statute." It is submitted that these decisions are of paramount importance in determining the intent of Congress. The conclusion expressed therein respecting the meaning of the restrictive phrase "within the District of Columbia" is in accord with the meaning given similar phrases in other jurisdictions.

The Supreme Court of the United States in *Pacific Express Co. v. Seibert*, 142 U. S. 339, defined the phrase "within this State" as used in a Missouri gross receipts tax statute. Mr. Justice Lamar states the Court's unanimous opinion respecting the meaning of this phrase in the following words:

"It is manifest that these provisions of the statute, so far from imposing a tax upon the receipts derived from the transportation of goods between other States and the State of Missouri, expressly limit the tax to receipts for the sums earned and charged for the *business done within the State*. This positive and oft-repeated limitation to business done within the State, that is, business begun and ended within the State, evidently intended to exclude, and the language employed certainly does exclude, the idea that the tax is to be imposed upon the interstate business of the company. 'Business done within the State' cannot be made to mean business done between that State and other States. We, therefore, concur in the view of the court below that it was not the legislative intention, in the enactment of this statute, to impinge upon interstate commerce, or to interfere with it in any way whatever; and that the statute, when fairly construed, does not in any manner interfere with interstate commerce" (p. 350).

This decision was rendered on January 4, 1892, and has since that time been the generally accepted definition of the restrictive phrase in question. It is true that the law involving taxation has undergone considerable change since the date of this decision, but there has been no change in the meaning or connotation of plain, simple words.

It has been consistently held by the Supreme Court of the United States that a state cannot impose a tax on gross receipts from interstate commerce that results in a direct burden on said commerce. (footnote 1)

In view of this well settled principle of law the State Legislatures have confined their gross receipts statutes to gross receipts from business done within the State in order to eliminate interstate receipts. Reference is made to the Virginia license tax, measured by gross receipts, contained in Section 227 of the Virginia Tax Code. (footnote 2)

¹ Gwin, White & Prince, Inc. v. Henneford et al., 305 U. S. 434; Adams Mfg. Co. v. Storen, 304 U. S. 307; James v. Dravo Contracting Co., 302 U. S. 134; Fisher Blend Station v. Tax Commission, 297 U. S. 650; Matson Navigation Co. v. State Board, 297 U. S. 441; Cooney v. Mt. States Telephone Co., 294 U. S. 384; Virginia v. Imperial Coal Sales Co., 293 U. S. 15; Minnesota v. Blasius, 290 U. S. 1; Anglo-Chilean Corp. v. Alabama, 288 U. S. 218; Fox Film Corp. v. Doyal, 286 U. S. 123; Eastern Air Transport, Inc. v. South Carolina, 285 U. S. 147; E. Ohio Gas Co. v. Tax Commission, 283 U. S. 465; Alward v. Johnson, 282 U. S. 509; New Jersey Bell Telephone Co. v. State, 280 U. S. 338; Panhandle Oil Co. v. Mississippi, 277 U. S. 218; Metcalf & Eddy v. Mitchell, 269 U. S. 514; U. S. Glue Co. v. Oak Creek, 247 U. S. 321; Cudahy Packing Co. v. Minnesota, 246 U. S. 450; Crew Levick Co. v. Pennsylvania, 245 U. S. 292; U. S. Express Co. v. Minnesota, 223 U. S. 335; Meyer v. Wells Fargo & Co., 223 U. S. 298; Philadelphia Steamship Co. v. Pennsylvania, 122 U. S. 326.

² "The specific license tax to be paid by every corporation, person, or association, for the privilege of operating the apparatus necessary to communicate by telephone, shall be, when the gross receipts do not exceed sixty-five thousand dollars, and when the number of miles of poles do not exceed seven hundred miles, and a majority of the stock or other property of such company is not owned or controlled by any other telephone or telegraph company whose receipts exceed sixty-five thousand dollars, a sum equal to one and one-sixteenth per centum of the *gross receipts of such corporation, person or association from business done within this State* during the year ending the thirty-first day of December preceding; when the gross receipts from business done within this State during any such year are in excess of sixty-five thousand dollars, or the number of miles of poles exceed seven hundred or a majority of the stock or other property of such company is owned or controlled by any other telephone or telegraph company whose receipts exceed sixty-five thousand dollars, the license tax shall be a sum equal to one and one-sixteenth per centum of such receipts up to sixty-five thousand dollars * * *." (Emphasis supplied)

This Virginia statute has been interpreted to include only gross receipts from business beginning and ending within the State of Virginia.

Article 7084 of the Revised Statutes of Texas, 1925, imposes a franchise tax on domestic and foreign corporations, which statute contains the following provisions:

“Every domestic and foreign corporation heretofore or hereafter chartered or authorized to do business in Texas, shall * * * pay * * * a franchise tax, * * * based upon that proportion of the outstanding capital stock, surplus and undivided profits, plus the amount of outstanding bonds, notes and debentures, other than those maturing in less than a year from date of issue, as the gross receipts from *its business done in Texas* bears to the total gross receipts of the corporation from its entire business, which tax shall be computed at the following rates for each One Thousand Dollars (\$1,000.00) or fractional part thereof: One Dollar (\$1.00) to One Million Dollars (\$1,000,000.00), sixty cents (60¢); in excess of One Million Dollars (\$1,000,000.00), thirty cents (30¢) provided that such tax shall not be less than Ten Dollars (\$10.00) in the case of any corporation, including those without capital stock.” (Emphasis supplied)

In *Flowers et al. v. Pan American Refining Corp.*, Texas Ct. of Civ. Apps., Oct. 1, 1941, 154 S. W. (2d) 982, the phrase “business done in Texas” as used in the above statute was interpreted by the Texas Court of Civil Appeals. The State contended that the phrase “business done in Texas” included sales made in Texas and consummated in other states. The Court held that while the statute might be susceptible of the interpretation sought by the State, in its opinion the phrase “business done in Texas” as employed in this statute was intended to mean business begun and completed in Texas, and not business begun in Texas and completed in some other state or foreign nation, or vice versa.

Thus it can be readily seen that the Petitioner’s interpretation of Title IV of the District of Columbia Revenue Act of 1939 is not only in accord with the decisions hereto-

fore rendered in the District of Columbia but is also in accord with the interpretations given similar statutes in other jurisdictions.

The interpretation placed on this statute by District authorities and affirmed by the Board of Tax Appeals includes as taxable that portion of Petitioner's interstate receipts which is allocated to the District of Columbia and inasmuch as all of Petitioner's property and employees are within the District of Columbia the result is that all of Petitioner's interstate gross receipts are taxable. The District of Columbia Revenue Act of 1939 which contained the new "gross receipts statute" also enacted a corporate net income tax. Title IV contains the "gross receipts statute" and Title II the net income tax. The net income tax contains the following provision as respects interstate net income (Sec. 4(b)):

"In the case of any corporation, gross income includes only the gross income from sources within the District of Columbia. The proper apportionment and allocation of income within and without the District may be determined by processes or formulas of general apportionment under rules and regulations prescribed by the Commissioners."

Respondent interprets the "gross receipts statute" as though it contained an allocation provision similar to the above. It is admitted that Petitioner's interstate gross receipts are allocable to the District but this is not true as to all utilities operating in the District. It is submitted that the Congress would have imposed the gross receipts levy on all gross receipts from District sources and would have provided for formulas of apportionment and allocation if it intended to tax allocated gross receipts from interstate business. Admittedly there is a great difference between a gross receipts tax and a net income tax. To tax allocated net income from interstate business could never amount to an unreasonable burden on interstate commerce because no tax is due until expenses are paid, whereas to tax allocated

gross receipts from interstate business might very well unreasonably burden interstate commerce because a tax is due regardless of expenses.

The Board of Tax Appeals for the District of Columbia based its opinion almost entirely on the proposition that Congress has the authority under the Constitution to tax interstate receipts for the benefit of the District of Columbia and cited in support thereof two decisions of the Supreme Court of the United States—*Western Live Stock et al v. Bureau*, 303 U. S. 250, *McGoldrick v. Berwind-White Mining Co.*, 309 U. S. 33, which according to the Board reversed the former immunity granted receipts from interstate business. The Board further points out that what doubts there may have been concerning the constitutional validity of such a tax on gross receipts have been dissipated by the recent decisions of the United States Court of Appeals for the District of Columbia having to do with the excise tax for the privilege of doing business imposed by the District of Columbia Revenue Act of 1937 (50 Stat. 673, 688).

Petitioner has not and does not challenge the power of Congress to impose a gross receipts tax on interstate revenues for the benefit of the District of Columbia but has admitted the existence of such authority. This proceeding is not concerned with what Congress can do but rather with determining what was intended. In the *Western Live Stock* case and the *McGoldrick* case the Supreme Court did approve gross receipts taxes affecting interstate commerce, but in both cases the intent of the legislature to include interstate receipts was not in question because the language used was clear and unambiguous.

In the *Western Live Stock* case the taxing statute was in the following words:

“I—At an amount equal to two percent of the gross receipts of any person engaging or continuing in any of the following businesses: * * * publication of newspapers and magazines (but the gross receipts of the

business of publishing newspapers or magazines shall include only the amounts received for the sale of advertising space) * * *

In the *McGoldrick* case the taxing ordinance was in the following words:

“* * * two percentum upon the amount of the receipts from every sale in the City of New York * * *”.

In neither of these cases were the levying portions of the statutes restricted to revenues from business conducted in a localized area as is the case of the “Gross Receipts Statute”, which is confined to “gross receipts from the sale of public utility commodities and services *within the District of Columbia.*”

It is likewise true that this Court (United States Court of Appeals for the District of Columbia) has approved as constitutionally sound the business privilege tax imposed by the District of Columbia Revenue Act of 1937 (50 Stat. 673, 688), which imposed a tax on interstate revenues, but likewise in that statute the intention was clear. Reference is made to Sec. 1(e) of Title VI, which describes taxable gross receipts:

“(e) The term ‘gross receipts’ means the gross receipts received from any business in the District of Columbia, including cash, credits, and property of any kind or nature, without any deduction therefrom on account of the cost of the property sold, the cost of materials, labor, or services or other costs, interest, or discount paid, or any other expenses whatsoever:”

It is submitted that “gross receipts from any business in the District of Columbia” as used in this statute is sufficiently broad to cover interstate as well as local business, whereas “gross receipts from the sale of public utility commodities and services within the District of Columbia” should obviously include only business with a local or District of Columbia situs.

It might be argued that the Petitioner's gross receipts from interstate business have a District of Columbia situs since such receipts are allocable to the District of Columbia. Assuming the correctness of that statement it would appear reasonable to assume that if such construction had been intended Congress would have included in the "Gross Receipts Statute" provisions for allocation and apportionment. Some of the utilities operating in the District of Columbia own properties outside the District, others generate power in the District which is sold outside and if Congress had intended to tax all utilities on interstate gross receipts allocable to the District it would have incorporated in the statute some mechanics to determine allocable gross receipts as was done in the case of the net income tax as above pointed out.

In the final analysis it is submitted that unless Congress had desired to change the base of the gross receipts levy it would have either made no change in the "Gross Earnings Statute" in respect to business covered or would have adopted wording similar to that used in Title II (the net income tax), both of which without question covered interstate as well as local business.

Before concluding this brief it might be helpful to briefly analyze the contentions of the respective parties in the light of the general rules of law governing the interpretation of statutes. The basic rule of statutory construction is stated by Cooley (Vol. 4, Sec. 1693) to be as follows:

"Statutes and ordinances imposing license and business taxes must be construed strictly in favor of the citizen and against the government. A fortiori, if the statute imposing a license tax also provides a penalty for doing business without a license, it is penal and must be strictly construed. License laws cannot be extended by construction, omissions cannot be supplied by the courts, and no license-tax can be exacted which is not imposed by the words of the statute or ordinance."

The statute here involved levies a tax on "gross receipts from the sale of public utility commodities and services within the District of Columbia." Respondent interprets this to mean gross receipts from the sales of commodities and services either partially or wholly within the District of Columbia. Such an interpretation amounts to an extension by construction and could not possibly be made without supplying additional words. Such an interpretation can not be upheld without violence to the general principle above cited.

In a recent Virginia case involving the interpretation of a license tax ordinance of the City of Richmond (*Williams et al. v. City of Richmond*, 14 S. E. (2d) 287), Mr. Justice Gregory of the Supreme Court of Appeals states the principles of statutory construction in the following language:

"One of the prime requisites of any statute is certainty, and this is especially true of a taxing statute. It is said in 25 R. C. L., Statutes, sec. 307: 'It is to be fairly and justly presumed that the legislature, which possesses a power so comparatively unrestrained in its force and searching in its extent as the power of taxation, has so shaped the law as, without ambiguity or doubt, to bring within it everything that it was meant should be embraced.' And the rule is expressed thus in 59 C. J., Statutes, sec. 160: '*Act imposing tax must, under the rules above stated, be certain, clear, and unambiguous, especially as to the subject of taxation and the amount of tax.*'" (Emphasis supplied)

Could it be stated that the legislature has in certain, clear and unambiguous language, as required by the above stated general principle of law, imposed a tax on this Company's interstate receipts by the language of Title IV of the District of Columbia Revenue Act of 1939? It is submitted that such was not intended and such was not done. In order to affirm the position of the Board of Tax Appeals for the District of Columbia this Court will be required to either add words to the present statute as above shown or transpose the present wording to read "sale, within the

District of Columbia of public utility commodities and services." The restrictive phrase "within the District of Columbia" is descriptive of "service" and it is submitted that unless the "service" sold is "service" within the District the revenues therefrom should not be taxed under this statute.

In view of the foregoing it is submitted that the action of the Assessor in collecting gross receipts taxes for the fiscal year 1941 from Petitioner on gross receipts from interstate business, which action was affirmed by the Board of Tax Appeals for the District of Columbia, was not in accord with the intent of Congress as expressed in the "Gross Receipts Statute" and that the judgment of the Board should be reversed and the Petitioner be entitled to a refund of \$58,443.99, being the amount of taxes and penalties on interstate business paid under protest by Petitioner.

CONCLUSION.

Petitioner has attempted in this brief to state its position in respect to the interpretation of the Act of July 1, 1902 and Title IV of the District of Columbia Revenue Act of 1939, called herein "gross earnings statute" and "gross receipts statute" respectively, and the reasons and argument in support thereof. Petitioner respectfully presents the following conclusion for the favorable consideration of your Honorable Body.

FIRST: The Act of July 1, 1902 imposing a gross earnings tax on Petitioner can not legally be interpreted to include the items of cost of raw material consumed in the manufacture of telephone directories because

- (a) Such an interpretation is contrary to the decision of the Court of Appeals of the District of Columbia in *District of Columbia v. Georgetown Gas Light Company*, 45 App. D. C. 63, and
- (b) Such an interpretation is also contrary to the interpretation of this statute as made by the taxing

authority and accepted by both Petitioner and Respondent for a period of approximately ten years.

Therefore Petitioner is entitled to a refund of \$20,081.56, being the amount paid by Petitioner under protest for the fiscal years 1939 and 1940, in respect to such directory costs, and the decision of the Board of Tax Appeals for the District of Columbia in this respect should accordingly be reversed, and

SECOND: Title IV of the District of Columbia Revenue Act of 1939 imposing a gross receipts tax on Petitioner was not intended and can not be legally interpreted to include Petitioner's gross receipts from interstate telephone business because

- (a) The tax is limited to gross receipts from sales of services "within the District of Columbia", which by its terms excludes gross receipts from interstate business, that is to say, business crossing the District Line,

Therefore Petitioner is entitled to a refund of \$58,443.99, being the amount paid by Petitioner under protest for the fiscal year 1941 in respect to such interstate gross receipts, and the decision of the Board of Tax Appeals for the District of Columbia should accordingly be reversed.

Respectfully submitted,

R. A. VAN ORSDEL,
J. R. COLEMAN, JR.,
Attorneys for Petitioner.

APPENDIX

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IN THE
United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA

No. 8390

THE CHESAPEAKE AND POTOMAC TELEPHONE
COMPANY, *Petitioner*,

v.

DISTRICT OF COLUMBIA, *Respondent*.

Petition for Review of Decision of the Board of Tax Appeals
for the District of Columbia.

APPENDIX TO BRIEF FOR PETITIONER.

**PLEADINGS, DOCKET ENTRIES AND OTHER PAPERS
DESIGNATED BY PETITIONER.**

1 **Board of Tax Appeals for the District of
Columbia.**

**The Chesapeake and Potomac Telephone Company,
Petitioner,**

v.

District of Columbia, Respondent.

PETITION.

The above named Petitioner respectfully presents this its petition for the cancellation of assessments of gross earnings taxes and penalties for the fiscal years 1939 and 1940 (computed on gross earnings for the years ending June 30, 1938 and June 30, 1939, respectively) and for the cancellation of an assessment of gross receipts taxes and penalties for the fiscal year 1941 (computed on gross receipts for the year ending June 30, 1940) and for the refunding of taxes and penalties paid by Petitioner in conformity with said assessments and alleges as follows:

1. The petitioner is a corporation organized under the laws of the State of New York and duly qualified to do business within the District of Columbia and has its principal office at 725 Thirteenth Street, Northwest, in the City of Washington, District of Columbia.

2. The taxes in controversy are gross earnings taxes for the fiscal year 1939 in the amount of \$8,115.18, with penalties in the amount of \$2,109.94, gross earnings taxes for the fiscal year 1940 in the amount of \$8,646.00, with penalties in the amount of \$1,210.44, and gross receipts taxes for the fiscal year 1941 in the amount of \$57,992.92, with penalties in the amount of \$1,159.86, all of said sums including penalties amounting to \$79,234.34.

3. The notices of assessment (statements of taxes due) were received by Petitioner on November 27, 1941 and all of said amounts including penalties were paid by Petitioner under written protest on December 22, 1941, all of which

will appear from Exhibits A, B, C and D attached
2 hereto, being respectively photostatic copy of Petitioner's written protest and photostatic copies of receipted tax bills for the three years in question.

4. The Act of July 1, 1902 imposed a gross earnings tax upon Petitioner. The pertinent provisions of this Act are as follows:

"Each national bank as the trustee for its stockholders, through its president or cashier, and all other incorporated banks, and trust companies, in the District of Columbia, through their presidents or cashiers, and all gas, electric lighting, and telephone companies, through their proper officers, shall make affidavit to the board of personal-tax appraisers on or before the first day of August each year as to the amount of its or their gross earnings for the preceding year ending the thirtieth day of June, and shall pay to the collector of taxes of the District of Columbia per annum on such gross earnings as follows: Each national bank, and all other incorporated banks, and trust companies, respectively, six per centum; each gas company, five per centum; each electric lighting, and telephone company, four per centum."

For the fiscal years 1939 and 1940 Petitioner filed its returns at the time required by law using for its report for both years forms furnished for that purpose by Respondent and paid the gross earnings taxes computed in accordance with said return. Attached hereto marked "Exhibit E" is photostatic copy of blank form used for the fiscal years in question, which as aforesaid were furnished Petitioner by Respondent. There are also attached hereto photostatic conformed copies of the statements of gross earnings attached to Petitioner's original returns for the fiscal years 1939 and 1940 filed by Petitioner as aforesaid and same are identified as "Exhibit F" and "Exhibit G". (Note: The printed returns filed by Petitioner contain no information as to the tax and it was not deemed necessary to attach same as an exhibit in this proceeding.)

Petitioner for the fiscal years 1939 and 1940 deducted from its advertising and directory gross receipts the cost of paper, printing, binding and transportation incurred in connection with said directories in order to determine its gross earnings from directory activities. As will appear from Exhibits F and G attached the deduction for the fiscal year 1939 was in the amount of \$202,879.51, and the deduction for the fiscal year 1940 was in the amount of \$216,150.08. This procedure was in accordance with the interpretation of the Act of 1902 as made by Respondent 3 as is evidenced by form of return (Exhibit E) furnished by Respondent and as is further evidenced by the acceptance by Respondent for a period of ten years of returns filed in like manner.

On April 25, 1941 Petitioner was advised by Respondent that it would be required to file amended returns for the fiscal years 1939 and 1940 and pay taxes on the items excluded as aforesaid, and on November 17, 1941, Petitioner under written protest filed revised returns as requested for the years involved, and on December 22, 1941 as before stated paid under written protest the taxes and penalties assessed against it by the Respondent for the fiscal years 1939 and 1940 as evidenced by the receipted bills heretofore attached (Exhibits B and C). Attached hereto is photostatic conformed copy of letter of protest filing said revised returns marked "Exhibit H" and photostatic conformed copies of statements of gross earnings attached to said revised returns marked "Exhibit I" and "Exhibit J". (Note: In the letter of protest filing the revised returns the fiscal years involved are erroneously referred to as 1938, 1939 and 1940, whereas the fiscal years involved are 1939, 1940 and 1941.—The printed returns filed are omitted for the same reason assigned in connection with Exhibits F and G.)

Petitioner alleges that the additional assessments for gross earnings taxes and penalties for the fiscal years 1939 and 1940 were erroneous and contrary to law for the following reasons:

a. The original returns of Petitioner for the years involved (Exhibits F and G) were filed in accordance with the Act of July 1, 1902 imposing said tax.

b. The original returns of Petitioner as aforesaid were filed in accordance with instructions from Respondent.

c. The interpretation of the Act of July 1, 1902 as heretofore made by Respondent and accepted by Petitioner for a period of ten years is in accordance with the decisions of the Court of Appeals for the District of Columbia (*District of Columbia v. Georgetown Gas Light Company*, 45 App. D. C. 63).

d. The assessment by Respondent as aforesaid is erroneous as a matter of law for other good and sufficient reasons.

5. Title IV of the District of Columbia Revenue Act of 1939, effective for the fiscal year 1941, imposes a gross receipts tax upon Petitioner in the following words:

4 "Each national bank as the trustee for its stockholders, through its president or cashier, and all other incorporated banks, and trust companies, in the District of Columbia, through their presidents or cashiers, and all gas, electric lighting, and telephone companies, through their proper officers, shall make affidavit to the board of personal-tax appraisers on or before the first day of August each year as to the amount of its or their gross earnings or gross receipts, as the case may be, for the preceding year ending the 30th day of June, and each national bank and all other incorporated banks and trust companies respectively shall pay to the collector of taxes of the District of Columbia per annum 6 per centum on such gross earnings and each gas company, electric lighting company, and telephone company shall pay to the collector of taxes of the District of Columbia per annum 4 per centum on such gross receipts, from the sale of public utility commodities and services within the District of Columbia."

For the fiscal year 1941 Petitioner filed its return at the time required by law and paid the tax assessed thereon. Attached hereto and marked "Exhibit K" is photostatic conformed copy of statement of gross receipts attached to the original return filed as aforesaid.

Petitioner for the fiscal year 1941 reported all its gross receipts "from the sale of public utility commodities and services within the District of Columbia" as required by Title IV of the District of Columbia Revenue Act of 1939. Petitioner alleges that said Act by its terms does not include gross receipts from the interstate business of Petitioner, that is to say, gross receipts from telephone calls originating in the District of Columbia and terminating elsewhere and calls originating elsewhere and terminating in the District of Columbia, as such business is not a public utility service "within the District of Columbia" within the meaning of the Act, and further Petitioner alleges that said Act by its terms does not include gross receipts from telegraph commissions received by Petitioner, as said receipts are not derived from the sale of a public utility service or commodity within the meaning of the Act but said receipts represent compensation paid Petitioner by telegraph companies for billing and collecting for telegraph service furnished by telegraph companies and is purely of a non-public utility character. Petitioner accordingly deducted from its return its gross receipts from interstate business and from telegraph commissions, totalling \$1,435,787.31 and \$17,372.27 respectively.

On April 25, 1941 Petitioner was advised by Respondent that it would be required to file an amended
5 return for the fiscal year 1941 and include therein the interstate receipts and telegraph commissions of Petitioner and pay a tax computed thereon. On November 17, 1941 Petitioner under written protest (See Exhibit H attached) filed a revised return for the fiscal year 1941, as requested by Respondent. A photostatic conformed copy

of statement of gross receipts attached to said revised return is attached hereto and marked "Exhibit L". On December 22, 1941, as before stated, Petitioner paid under written protest the taxes and penalties assessed against it by Respondent for the fiscal year 1941, as evidenced by receipted bill heretofore attached (Exhibit D).

Petitioner alleges that the additional assessment for gross receipts taxes and penalties for the fiscal year 1941 was erroneous and contrary to law for the following reasons:

a. The original return of Petitioner for the fiscal year 1941 (Exhibit K) was prepared and filed in accordance with Title IV of the District of Columbia Revenue Act of 1939 imposing said tax.

b. The original return of Petitioner, as aforesaid, was prepared and filed in accordance with the decisions of the Court of Appeals for the District of Columbia and in accordance with the decisions of the Supreme Court of the United States.

c. The interpretation and administration of said Act by Respondent whereby the interstate receipts and the telegraph commissions of Petitioner are subjected to the tax imposed thereby is contrary to the intent of the Congress of the United States, and contrary to the decisions of the Court of Appeals for the District of Columbia and the Supreme Court of the United States.

d. The assessment by Respondent as aforesaid is erroneous as a matter of law for other good and sufficient reasons.

Wherefore, Petitioner prays that this Board may hear this proceeding and adjudge and decree that the assessment for gross earnings taxes for the fiscal year 1939 in the amount of \$8,115.18, with penalties in the amount of \$2,109.94, and that the assessment of gross earnings taxes for the fiscal year 1940 in the amount of \$8,646.00, with penalties in the amount of \$1,210.44, and that the assessment for gross receipts taxes for the fiscal year 1941 in the amount of \$57,992.92, with penalties in the amount of \$1,-

159.86, are all contrary to law, and that the Petitioner be
 refunded all of the amounts paid in accordance with
 6 said assessments, which said amounts total \$79,-
 234.34, and that the Petitioner be granted such fur-
 ther relief, both general and special, as may seem proper
 in the premises.

THE CHESAPEAKE AND POTOMAC
 TELEPHONE COMPANY

By (S) C. A. ROBINSON

Vice President and General Manager

District of Columbia, ss:

C. A. Robinson, being duly sworn, says that he is Vice
 President and General Manager of The Chesapeake and
 Potomac Telephone Company, Petitioner herein, and as
 such is duly authorized to verify the foregoing petition;
 that he has read the foregoing petition and is familiar with
 the statements contained therein and that the statements
 contained therein are true except those stated to be upon
 information and belief, and those he believes to be true.

(S) C. A. ROBINSON

Subscribed and sworn to before me this 12th day of Jan.,
 1942.

(S) EMMA I. HOFFER

(Seal)

Notary Public, D. C.

My commission expires Feb. 14, 1943.

Attorneys for Petitioner:

R. A. VAN ORSDEL

J. R. COLEMAN, JR.

725 13th St. N. W.,

Washington, D. C.

* * * * *

List of Exhibits

- Exhibit A—Photostatic conformed copy of written protest accompanying payment of taxes in dispute.
- Exhibit B—Photostatic copy of Notice of Assessment (Statement of taxes due) for the fiscal year 1939, marked "Paid".
- Exhibit C—Photostatic copy of Notice of Assessment (Statement of taxes due) for the fiscal year 1940, marked "Paid".
- Exhibit D—Photostatic copy of Notice of Assessment (Statement of taxes due) for the fiscal year 1941, marked "Paid".
- Exhibit E—Photostatic copy of blank form furnished by Respondent to be used in filing Gross Earnings Report.
- Exhibit F—Photostatic conformed copy of statement of gross earnings attached to Petitioner's original return for the fiscal year 1939.
- Exhibit G—Photostatic conformed copy of statement of gross earnings attached to Petitioner's original return for the fiscal year 1940.
- Exhibit H—Photostatic conformed copy of written protest accompanying filing of returns for the fiscal years 1939, 1940 and 1941.
- Exhibit I—Photostatic conformed copy of statement of gross earnings attached to Petitioner's revised return for the fiscal year 1939.
- Exhibit J—Photostatic conformed copy of statement of gross earnings attached to Petitioner's revised return for the fiscal year 1940.
- Exhibit K—Photostatic conformed copy of statement of gross receipts attached to Petitioner's original return for the fiscal year 1941.
- Exhibit L—Photostatic conformed copy of statement of gross receipts attached to Petitioner's revised return for the fiscal year 1941.

8

"Exhibit A"

December 22, 1941.

Collector of Taxes,
District of Columbia,
Washington, D. C.

Dear Sir:

Attached hereto is check of The Chesapeake and Potomac Telephone Company in the amount of \$79,234.34, which represents payment of taxes and penalties as follows:

	Tax	Penalty	Total
Gross Earnings Tax for Fiscal Year 1939	\$8,115.18	\$2,109.94	\$10,225.12
Gross Earnings Tax for Fiscal Year 1940	8,646.00	1,210.44	9,856.44
Gross Receipts Tax for Fiscal Year 1941	57,992.92	1,159.86	59,152.78
Total			<u>\$79,234.34</u>

This payment is being made under written protest, as provided by law, and the Company specifically reserves all of its rights to appeal from the assessments involved and the collection of the taxes and penalties hereby made.

Respectfully yours,

Original signed by

C. A. ROBINSON

Vice President and General Manager

12

“Exhibit E”

THE CHESAPEAKE AND POTOMAC TELEPHONE COMPANY

Gross Earnings for 12 Months ended June 30, 1938

Revenues from:

Subscribers' Stations	\$
Public Pay Stations	
Service Stations	
Private Exchange Lines	
Minor Rents of Exchange Plant	
Minor Rents of Toll Plant	
Telegraph Commissions	
Advertising and Directory	
Gross Receipts	\$
Less cost of Directory—Paper, Printing, Binding and Transportation	
Rents from other Operating Property	
Other Miscellaneous Revenues	
Interest Earned	
Sinking and Other Reserve Fund Accretions	
Miscellaneous Non-operating Revenues	
Less Uncollectible written off	\$

District of Columbia, ss:

I hereby solemnly swear to the best of my knowledge and belief that the amounts as given above represents the total gross earnings of the Chesapeake and Potomac Telephone Company for the preceding twelve months ending June 30, 1938.

.....
Treasurer

Subscribed and sworn to before me this day of July
1938.

.....
Notary Public, D. C.

"EXHIBIT B"

OFFICE OF THE ASSESSOR, DISTRICT OF COLUMBIA
GROSS EARNINGS AND GROSS RECEIPTS TAX

SECOND HALF

FISCAL YEAR 1939

TAX FOR PERIOD FROM JULY 1, 1938 TO JUNE 30, 1939

GROSS EARNINGS	RATE	TOTAL TAX	ONE HALF TAX	ONE HALF TAX
11,226,400.99	4 %	449,056.04		
Amt. paid Sept. 30, 1938 & Mar 31, 1939....		440,940.86		

The Chesapeake and Potomac
Telephone Co.,
725 13th St., N. W.,
Washington, D. C.

8,115.18
2,109.94 * 26 Penalty
10,225.12 Balance Due
FIRST HALF OF TAX DUE SEPTEMBER, 193
SECOND HALF OF TAX DUE MARCH, 193

9008 PUBLIC UTILITIES, BANK, BLDG. ASS'NS, ETC.

TO THE DISTRICT OF COLUMBIA, DR. PAY TO THE COLLECTOR OF TAXES, D. C.

Corrected 11/19/41

9

"EXHIBIT C"

OFFICE OF THE ASSESSOR, DISTRICT OF COLUMBIA
GROSS EARNINGS AND GROSS RECEIPTS TAX

SECOND HALF

FISCAL YEAR 1939-1940.

TAX FOR PERIOD FROM JULY 1, 1939 TO JUNE 30, 1940.

GROSS EARNINGS	RATE	TOTAL TAX	ONE HALF TAX	ONE HALF TAX
11,776,298.96	4 %	471,051.96		
Amt. paid Sept. 30, 1939 & Mar 30, 1940....		462,405.96		

The Chesapeake and Potomac
Telephone Co.,
725 13th St., N. W.,
Washington, D. C.

8,646.00
1,210.44 * 14
9,856.44 balance due
FIRST HALF OF TAX DUE SEPTEMBER, 193
SECOND HALF OF TAX DUE MARCH, 193

9008 PUBLIC UTILITIES, BANK, BLDG. ASS'NS, ETC.

TO THE DISTRICT OF COLUMBIA, DR. PAY TO THE COLLECTOR OF TAXES, D. C.

Corrected 11/19/41

10

"EXHIBIT D"

OFFICE OF THE ASSESSOR, DISTRICT OF COLUMBIA
GROSS EARNINGS AND GROSS RECEIPTS TAX

SECOND HALF

FISCAL YEAR 1940-1941.

TAX FOR PERIOD FROM JULY 1, 1940 TO JUNE 30, 1941.

GROSS RECEIPTS	RATE	TOTAL TAX	ONE HALF TAX	ONE HALF TAX
12,070,728.61	4 %	482,829.14		
Amt. paid Sept. 30, 1940 & Mar 31, 1941....		424,836.22		

Chesapeake & Potomac
Telephone Co.
725 13th St., N. W.,
Washington, D. C.

57,992.92
1,159.86 * 2
59,152.78 Balance Due
FIRST HALF OF TAX DUE SEPTEMBER, 193
SECOND HALF OF TAX DUE MARCH, 193

9008 PUBLIC UTILITIES, BANK, BLDG. ASS'NS, ETC.

TO THE DISTRICT OF COLUMBIA, DR. PAY TO THE COLLECTOR OF TAXES, D. C.

Corrected 11/19/41

11

13

"Exhibit F"

The Chesapeake and Potomac Telephone Company		
Gross Earnings For 12 Months Ending June 30, 1938		
Subscribers' Station Revenues		\$8,580,198.00
Public Telephone Revenues		1,161,032.18
Service Stations		2,013.06
Local Private Line Services		73,082.15
Message Tolls		830,148.68
Toll Private Line Services		16,976.27
Other Toll Service Revenues		364.28
Telegraph Commissions		16,112.20
Directory Advertising and Sales	\$374,127.28	
Less Cost of Directory—paper, printing, binding and transportation	202,879.51	171,247.77
Rent Revenues		200,285.45
Other Operating Revenues		3,026.63
Dividend Income		460.00
Interest Income		461.19
Miscellaneous Income		7,698.78
Total Revenues		\$11,063,106.64
Uncollectible Written Off		39,585.16
Total Net Revenues		<u><u>\$11,023,521.48</u></u>

District of Columbia, ss:

I hereby solemnly swear to the best of my knowledge and belief that the amounts as given above represent the total gross earnings of The Chesapeake and Potomac Telephone Company for the preceding twelve months ending June 30, 1938.

Original signed by
F. W. BRADBURY,
Auditor.

Subscribed and sworn to before me this 19th day of July, 1938.

(S) P. C. KING
Notary Public, D. C.

14

"Exhibit G"

The Chesapeake and Potomac Telephone Company

Gross Earnings For 12 Months Ending June 30, 1939

Subscribers' Station Revenues		\$8,983,580.53
Public Telephone Revenues		1,213,315.24
Service Stations		3,990.16
Local Private Line Services		80,879.67
Message Tolls		894,408.14
Toll Private Line Services		12,745.17
Other Toll Service Revenues		400.78
Telegraph Commissions		16,039.74
Directory Advertising and Sales	\$402,809.29	
Less Cost of Directory—paper, printing, binding and transportation	216,150.08	186,659.21
Rent Revenues		194,789.50
Other Operating Revenues		2,393.35
Dividend Income		460.00
Interest Income		266.58
Miscellaneous Income		7,963.48
Total Revenues		\$11,597,891.55
Uncollectible Written Off		37,742.67
Total Net Revenues		<u>\$11,560,148.88</u>

District of Columbia, ss:

I hereby solemnly swear to the best of my knowledge and belief that the amounts as given above represent the total gross earnings of The Chesapeake and Potomac Telephone Company for the preceding twelve months ending June 30, 1939.

(S) F. W. BRADBURY

Auditor.

Subscribed and sworn to before me this 18th day of July, 1939.

P. C. KING

(Seal)

Notary Public, D. C.

November 17, 1941.

Mr. L. L. Cornwell, Clerk to the
Board of Personal Tax Appraisers,
Government of the District of Columbia,
Washington, D. C.

Dear Sir:

As requested in your letter of November 8, 1941 we enclose herewith revised gross earnings tax returns of The Chesapeake and Potomac Telephone Company for the fiscal years 1938 and 1939, and revised gross receipts tax return of The Chesapeake and Potomac Telephone Company for the fiscal year 1940.

This filing is made under protest and upon condition that the Company does not waive its right to appeal from a determination of additional tax liability, as it is the Company's opinion that any additional assessment made by the District of Columbia against it would be contrary to law and without legal effect.

Very truly yours,

Original signed by

R.A.V.

C. A. ROBINSON

J.R.C.

Vice President and General Manager

JRC:D

The Chesapeake and Potomac Telephone Company
Gross Earnings For 12 Months Ending June 30, 1938 in
Accordance With Letter of Deputy Assessor for the
District of Columbia Dated April 25, 1941

1. Total Gross Earnings, heretofore
reported and tax paid thereon \$11,023,521.48

Plus 2. Cost of Directory—paper, printing, binding and transportation here- tofore deducted from Gross Directory Receipts	202,879.51
3. Total Net Revenues	\$11,226,400.99
4. Total Tax	449,056.04
5. Less Tax heretofore paid	440,940.86
6. Additional Tax	<u>\$ 8,115.18</u>

District of Columbia, ss:

I, F. W. Bradbury, Auditor of The Chesapeake and Potomac Telephone Company do hereby certify that the foregoing statement of earnings of The Chesapeake and Potomac Telephone Company for the year ending June 30, 1938 filed in accordance with letter of Deputy Assessor of the District of Columbia dated April 25, 1941 is a true and correct statement of same.

(S) F. W. BRADBURY
Auditor.

Subscribed to and sworn before me this 6th day of August 1941.

(S) HUGH W. SMITH,
Notary Public.

(Seal)

17

“Exhibit J”

The Chesapeake and Potomac Telephone Company
Gross Earnings For 12 Months Ending June 30, 1939 in
Accordance With Letter of Deputy Assessor for the
District of Columbia Dated April 25, 1941

1. Total Gross Earnings, heretofore reported and tax paid thereon	\$11,560,148.88
--	-----------------

Plus 2. Cost of Directory—paper, printing, binding and transportation here- tofore deducted from Gross Directory Receipts	216,150.08
3. Total Net Revenues	\$11,776,298.96
4. Total Tax	471,051.96
5. Less Tax heretofore paid	462,405.96
6. Additional Tax	\$ 8,646.00

District of Columbia, ss:

I, F. W. Bradbury, Auditor of The Chesapeake and Potomac Telephone Company do hereby certify that the foregoing statement of earnings of The Chesapeake and Potomac Telephone Company for the year ending June 30, 1939 filed in accordance with letter of Deputy Assessor of the District of Columbia dated April 25, 1941 is a true and correct statement of same.

(S) F. W. BRADBURY

Auditor.

Subscribed to and sworn before me this 6th day of August 1941.

(S) HUGH W. SMITH

(Seal)

Notary Public.

18

“Exhibit K”

The Chesapeake and Potomac Telephone Company
Gross Receipts From the Sale of Public Utility Services
Within the District of Columbia for the Year June 30,
1940

Subscribers' Station Revenues	\$9,327,387.45
Public Telephone Revenues	1,228,016.76
Service Stations	4,285.62

Local Private Line Services	89,830.85
Other Operating Revenues	4,250.72
Total Revenues	\$10,653,771.40
Less Uncollectible Written Off	32,865.62
Total Net Revenues	<u>\$10,620,905.78</u>

District of Columbia, ss:

I. F. W. Bradbury, Auditor of The Chesapeake and Potomac Telephone Company do hereby certify that the above statement represents the gross receipts of The Chesapeake and Potomac Telephone Company from the sale of public services within the District of Columbia for the year ending June 30, 1940, and that said statement to the best of my information and belief is true and correct.

(S) F. W. BRADBURY

Auditor.

Subscribed to and sworn before me this 19th day of July 1940.

(S) W. C. CARBO

(Seal)

Notary Public.

19

"Exhibit L"

The Chesapeake and Potomac Telephone Company
Gross Receipts From the Sale of Public Utility Services
Within the District of Columbia for the Year June 30,
1940 in Accordance With Letter of Deputy Assessor
for the District of Columbia Dated April 25, 1941

1. Total Gross Receipts heretofore reported and tax paid thereon	\$10,620,905.78
Plus 2. Gross Receipts from interstate business	\$1,435,787.31
3. Telegraph Commissions	17,372.27
	<u>\$12,074,065.36</u>

Less 4. Uncollectibles on (2) and (3)	3,336.75
5. Total Net Revenues	\$12,070,728.61
6. Total Tax	482,829.14
7. Less Tax heretofore paid	424,836.23
8. Additional Tax	\$ 57,992.91

District of Columbia, ss:

I, F. W. Bradbury, Auditor of The Chesapeake and Potomac Telephone Company do hereby certify that the foregoing statement of gross receipts of The Chesapeake and Potomac Telephone Company for the year ending June 30, 1940 filed in accordance with letter of Deputy Assessor of the District of Columbia dated April 25, 1941 is a true and correct statement of same.

(S) F. W. BRADBURY

Auditor.

Subscribed to and sworn before me this 6th day of August 1941.

(S) HUGH W. SMITH

(Seal)

Notary Public.

* * * * *

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FINDINGS OF FACT AND OPINION.

Board of Tax Appeals for the District of Columbia

The Assessor of the District of Columbia assessed the petitioner and the petitioner paid to the District the sum of \$20,081.56 as additional gross earnings "taxes and penalties thereon for the fiscal years ending June 30, 1939 and June 30, 1940, hereinafter called "fiscal years 1939 and 1940", and the sum of \$59,152.78 as an additional "gross receipts" tax and penalty thereon for the fiscal year ending June 30, 1941, hereinafter called "fiscal year 1941". The petitioner here seeks refund of such taxes. It is alleged by the petitioner that the additional gross earnings taxes were assessed in error, in that, the Assessor in

computing the petitioner's gross earnings for the purpose of taxation disallowed as an item of deduction sums expended as cost of its telephone directory; and that the additional gross receipts tax was assessed in error, in that, the Assessor in computing the petitioner's gross receipts for the purpose of taxation included therein sums *not* received by the petitioner "from the sale of public utility commodities and services within the District of Columbia" as contemplated by Title IV of the District of Columbia Revenue Act of 1939.

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Findings of Fact

The parties hereto have stipulated, and the Board adopts as its findings of fact the following:

"1/ The Chesapeake and Potomac Telephone Company, petitioner in this proceeding, is a corporation organized under the laws of the State of New York and duly qualified to do business within the District of Columbia. Petitioner is a public utility engaged in the business of furnishing communication service in the District of Columbia and has its principal office at 725 13th Street, N. W., in the City of Washington, District of Columbia.

"2/ The taxes involved in this proceeding are gross 'earnings' taxes for the fiscal years 1939 and 1940 under the Act of July 1, 1902 (32 Stat. 590, 619) and gross 'receipts' taxes for the fiscal year 1941 under Title IV of the District of Columbia Revenue Act of 1939 (Title 47, Sec. 1701, District of Columbia Code, 1940). The Act of 1902 imposed upon telephone companies a tax of 4% on 'gross earnings', while Title IV of the Revenue Act of 1939 imposed upon telephone companies a tax of 4% on such 'gross receipts, from the sale of public utility commodities and services within the District of Columbia'. The 1902 Act did not limit the tax to earnings from the sale of 'public utility commodities and services'. The particular question involved in the determination of the correct tax for the fiscal years 1939 and 1940 is whether, under the 'gross

earnings' tax statute, the petitioner is entitled to deduct certain costs as representing the costs of paper, printing, binding and transporting the telephone directory in arriving at gross earnings. The particular question involved in the determination of the correct tax for the fiscal year 1941 is whether or not revenues received by the Petitioner from 'long distance', or 'toll service', 'extended area service', 'interzone service' and all other services crossing the District line and commissions Petitioner received from telegraph companies are 'from the sale of public utility commodities and services within the District of Columbia.'

"3/ At the times required by law Petitioner filed its returns of gross earnings for the fiscal years 1939 and 1940, and paid the taxes assessed thereon by the District of Columbia, referred to herein as Respondent.

"4/ The gross earnings tax for the fiscal year 1939 was based on gross earnings for the year ending June 30, 1938, and the taxes paid by Petitioner for said year were in the total amount of \$440,940.86, based on reported gross earnings totalling \$11,023,521.48. As appears from the return filed with Respondent the following items were reported by Petitioner as being subject to said tax and used by the Respondent as the basis for the original assessment:

23 Gross Earnings for 12 Months Ending June 30, 1938

Subscribers' Station Revenues	\$8,580,198.00
Public Telephone Revenues	1,161,032.18
Service Stations	2,013.06
Local Private Line Services	73,082.15
Message Tolls	830,148.68
Toll Private Line Services	16,976.27
Other Toll Service Revenues	364.28
Telegraph Commissions	16,112.20
Directory Advertising and Sales	\$374,127.28
Less Cost of Directory—paper,	

printing, binding and transportation	202,879.51	171,247.77
Rent Revenues		200,285.45
Other Operating Revenues		3,026.63
Dividend Income		460.00
Interest Income		461.19
Miscellaneous Income		7,698.78
Total Revenues		\$11,063,106.64
Uncollectible Written Off		39,585.16
Total Net Revenues		\$11,023,521.48

“5/ The gross earnings tax for the fiscal year 1940 was based on gross earnings for the year ending June 30, 1939, and the taxes paid by Petitioner for said year were in the total amount of \$462,405.96, based on reported gross earnings totalling \$11,560,148.88. As appears from the return filed with the Respondent the following items were reported by Petitioner as being subject to said tax and used by the Respondent as the basis for the original assessment:

24 Gross Earnings for 12 Months Ending June 30, 1939

Subscribers' Station Revenues		\$8,983,580.53
Public Telephone Revenues		1,213,315.24
Service Stations		3,990.16
Local Private Line Services		80,879.67
Message Tolls		894,408.14
Toll Private Line Services		12,745.17
Other Toll Service Revenues		400.78
Telegraph Commissions		16,039.74
Directory Advertising and Sales	\$402,809.29	
Less Cost of Directory—paper, printing, binding and transportation	216,150.08	186,659.21
Rent Revenues		194,789.50
Other Operating Revenues		2,393.35

Dividend Income	460.00
Interest Income	266.58
Miscellaneous Income	7,963.48
Total Revenues	\$11,597,891.55
Uncollectible Written Off	37,742.67
Total Net Revenues	\$11,560,148.88

“6/ By letter dated April 25, 1941, the Respondent advised the Petitioner that the Corporation Council of the District of Columbia had rendered an opinion on the matter of gross receipts and gross earnings taxes, in which the opinion was quoted to the effect that the Act of July 1, 1902 imposed a tax of 4% on gross earnings received by the Petitioner, which did not limit the tax to earnings from the sale of public utility commodities or services, and that the revenues, without deductions, from advertising space in the telephone directory in a fiscal year prior to the year ended June 30, 1940, should have been included in the computation of gross earnings, and were therefore subject to the tax of 4% on gross earnings prior to such time. After quoting the opinion, the Respondent advised the Petitioner that it was necessary for the Petitioner to revise its gross earnings tax returns, and requested the Petitioner to prepare and submit for the two fiscal years here involved supplemental returns embracing only those items or amounts that were omitted but which were in the opinion of the Corporation Counsel subject to the gross earnings tax.

“7/ Accordingly, the Petitioner under written protest made its supplemental returns, showing for the fiscal year 1939 the sum of \$202,879.51 and for the fiscal year 1940 the sum of \$216,150.08, as the amounts which had been omitted from the original returns for those years as representing directory costs and upon which no taxes were paid.

“8/ The telephone directory is a publication issued by the Petitioner and furnished to its subscribers with no spe-

cific charge therefor. The directory contains an alphabetical listing of telephone subscribers and other information to assist subscribers in the use of telephone facilities. The petitioner sells advertising space in its directory, and the receipts reported in its returns for the fiscal years 1939 and 1940 as being from "directory Advertising and Sales" came primarily from sales of advertisements in the directory.

"9/ The telephone directory is published for the Petitioner by an independent contractor under a contract between the printer and Western Electric Company. The Petitioner pays the Western Electric Company for the directory as a finished product. The amounts of \$202,879.51 and \$216,150.08, deducted by the Petitioner in its returns

for the fiscal years 1939 and 1940, respectively, 26 represent amounts expended by the printer for paper, printing, binding and transportation in connection with directories furnished the Petitioner in such years. All other expenses in connection with directory activities such as cost of compilation, distribution to subscribers and sales of advertisement were not deducted but were included in the originally reported taxable amount, which expenses according to Petitioner's records amounted to \$90,769.92 and \$97,527.14, respectively, for the two years here involved.

"10/ The returns or reports of gross earnings filed by Petitioner for the years here involved, copies of which appear in Paragraphs 4 and 5 above, included the same items or accounts as had been reported by Petitioner and taxes assessed thereon by Respondent for all prior fiscal years from 1931 to 1938 inclusive. The reports filed for these two years as well as the prior years, as aforesaid, were based on a typewritten form furnished Petitioner for this purpose by Respondent and as appears from the copy of the returns (Paragraphs 4 and 5) contain a space for the deduction of paper, printing, binding and transportation in connection with directory activities.

“11/ On December 22, 1941 the Petitioner under written protest paid taxes and penalties assessed against it for the years involved, which consisted of the following amounts:

Fiscal Year	Tax	Penalties	Total
1939	\$8,115.18	\$2,109.94	\$10,225.12
1940	8,646.00	1,210.44	9,856.44
			\$20,081.56

27 “12/ The taxes involved for the fiscal year 1941 are imposed under Title IV of the District of Columbia Revenue Act of 1939 (Title 47, Sec. 1701, District of Columbia Code, 1940). Section 2 of that Title amended the Act of July 1, 1902 by changing the basis of taxes imposed upon the Telephone Company from ‘gross earnings’ to ‘gross receipts’ and imposed a tax of 4% ‘on such gross receipts, from the sale of public utility commodities and services within the District of Columbia.’ At the time required by law the Petitioner filed its return of gross receipts from the sale of public utility commodities and services within the District of Columbia for the fiscal year 1941 according to its interpretation of the law and paid the taxes assessed upon that return by the Respondent.

“13/ The gross receipts tax for the fiscal year 1941 was based on gross receipts for the year ending June 30, 1940, and the gross receipts taxes paid by the Petitioner for the said year were in the total amount of \$424,836.22, based on reported gross receipts totalling \$10,620,905.78. As appears from the return filed with the Respondent, the following items were reported by the Petitioner as being subject to the said tax:

Gross Receipts From the Sale of Public Utility Services
Within the District of Columbia for the Year June 30,
1940

Subscribers' Station Revenues	\$ 9,327,387.45
Public Telephone Revenues	1,228,016.76
Service Stations	4,285.62
Local Private Line Services	89,830.85
Other Operating Revenues	4,250.72
Total Revenues	\$10,653,771.40
Less Uncollectible Written Off	32,865.62
Total Net Revenues	\$10,620,905.78

28 "14/ In the reported gross receipts for the fiscal year 1941 as hereinabove shown the Petitioner did not include revenues received by it from telephone services rendered by it in connection with telephone communications from points outside the District of Columbia to points within the District, or from points within the District to points without the District, or from and to points outside the District but routed through the District, which for the year involved amounted to \$1,435,787.31. No taxes were paid on the said amount. The Petitioner did not include in its reported gross receipts, as shown, revenues received for the year involved from telegraph companies for services performed by Petitioner as hereinafter described, which during said year amounted to \$17,372.27, and no taxes were paid on this amount.

"15/ In the letter dated April 25, 1941, heretofore referred to, the Respondent advised the Petitioner that the Corporation Counsel of the District of Columbia had rendered an opinion to the effect that the revenues retained by the Petitioner on toll service constitute gross receipts from utility services within the District of Columbia within the meaning of Title IV of the Revenue Act of 1939, and are therefore subject to tax. The Petitioner was also ad-

vised that settlement items received by Petitioner as compensation for extended area and interzone services and commissions retained from telegraph companies also constitute gross receipts from the sale of utility services within the District of Columbia within the meaning of the said Title,

and were in the opinion of the Corporation Counsel
29 subject to the gross receipts tax. Accordingly, the

Petitioner was requested to file a supplemental return for the fiscal year 1941 showing revenues received by the Petitioner for all of the said services above described.

“16/ All of Petitioner’s plant and facilities are located within the District of Columbia.

“17/ Petitioner’s telephone revenues are derived from (a) local telephonic services within the District of Columbia, that is to say, business begun and completed within the geographical confines of the District, and (b) telephonic services beginning in the District and terminating outside the District, and beginning outside the District and terminating within the District, and beginning and terminating outside the District but routed through the District. The revenues and the taxes thereon from business shown in (a) above are not in dispute in this proceeding.

“18/ The Petitioner’s gross receipts from the public utility services described in (b) in the preceding paragraph for the year involved amounted to \$1,435,787.31, and were derived from the following specific types of business:

“19/ Long Distance or Toll Revenues Received from American Telephone and Telegraph Company—

In this type of service the Petitioner receives from the American Telephone and Telegraph Company (herein called American Company) a part of the charge made by the American Company for long distance calls originating within the District of Columbia and terminating elsewhere, or originating elsewhere and terminating in the District.

In this type of business the messages are trans-
30 mitted over the circuits of the American Company to or from the exchange facilities of the Petitioner, and

to or from the exchange facilities of the Petitioner over the Petitioner's lines to the telephone customers. The Petitioner collects the toll charge on calls originating in the District and retains a part thereof for its services, based on a sliding scale of charges determined by the average amount per call collected from such calls during the monthly accounting period. The Petitioner does not receive a specific amount for the service it renders in terminating long distance calls in the District, but the part of the charges retained by the Petitioner on calls originating in the District of Columbia is to reimburse the Petitioner for handling both incoming and outgoing messages over the Petitioner's own facilities and for the expenses of billing, collecting, and handling. The total gross receipts to the Petitioner for the year involved for this type of service were \$660,756.94, no part of which was reported in the original return.

“20/ Long Distance or Toll Revenues from Other Associated Companies—

(a) In certain instances long distance calls are transmitted over Petitioner's facilities that originate outside the District and terminate outside the District in Maryland, Virginia, West Virginia or Delaware. Such calls are transmitted to points within the District of Columbia over circuits of the American Company or an associated company, then from the said points in the District of Columbia to the District line over circuits of the Petitioner, and from the District line to points of termination over facilities of an associated company. In such cases the Petitioner is paid by the associated company for commercial expenses involved and a pro rata of line haulage. The total gross receipts to the Petitioner from this source for the year involved were \$51,123.72, no part of which was reported in the original return.

(b) In accordance with agreements between Petitioner and associated companies, certain long distance or toll calls are handled entirely over the facilities of the Petitioner

and the associated companies and not over the circuits of the American Company. For such business the Petitioner receives an originating commission for calls originating within the District of Columbia plus a pro rata part of the line haulage, and also receives a pro rata part of the line haulage on calls originating elsewhere and terminating in the District. The total gross receipts from this class of service for the year involved were \$335,361.45, no part of which was reported in the original return.

“21/ Revenues Received by Petitioner from Services in the Interzone Areas and Extended Areas—

(a) Telephone calls to and from the District of Columbia and certain exchange areas in nearby Virginia and Maryland are made on a message unit charge basis. Pursuant to the terms of contracts with associated companies, 85% of the message unit charge is retained by the company in whose territory the call originates, and the remainder is pro rated on the basis of line haul. For such business the Petitioner receives the originating commission of 85% of the charge on calls originating in the District plus a pro rate of line haulage and on calls originating elsewhere and terminating in the District a pro rate of line haulage.

32 The total gross receipts to the Petitioner for interzone service during the year involved were \$214,138.26, which amount was not reported in the original return.

“(b) The Petitioner’s subscribers in the District of Columbia have the privilege of calling certain subscribers in exchanges of associated companies in nearby Virginia and Maryland, and the subscribers in these exchange areas likewise have the privilege of calling District of Columbia subscribers, and the charge for this privilege is included in the regular telephone rate. This service is defined as the extended area service. Pursuant to contracts between the Petitioner and the associated companies, respectively, monthly settlements are made between the respective companies based on the number of calls from the exchange of

one company to the other and on the line haul involved. The total gross receipts to the Petitioner from this source for the year involved were \$111,138.68, which amount was not reported in the original return.

“22/ Other Revenues Where Service Extended Beyond the District—

“The remainder of revenues received by Petitioner for the year involved totalling \$63,268.26 for miscellaneous utility services rendered by it not described in paragraphs 19, 20 and 21 hereinabove, is received from business such as private lines extending from the District of Columbia to points outside the District, or from lines extending from points outside the District into the District, and for other similar services rendered where such service involved crossing the District line. The revenues received from this type of business are determined principally on the basis of line haulage plus appropriate originating commissions. No part of this amount of \$63,268.26 was included in the original return filed by the Petitioner.

“23/ No part of the revenues collected by Petitioner and transmitted to the American Company or to any associated company in connection with any of the telephone business described in paragraphs 19 to 22 inclusive are assessed and taxed by the Respondent. The total amount of revenues from all of the businesses described as aforesaid in the amount of \$1,435,787.31 is the amount received by the Petitioner for that portion of the services furnished by its plant and employees within the District of Columbia in connection with the above described business.

“24/ The commissions received by Petitioner from telegraph companies, which for the fiscal year involved amounted to \$17,372.27, consists of amounts paid Petitioner by telegraph companies for permitting telegraph company customers to charge telegraph companies tariff rates on telephone bills and for billing and collecting such charges and remitting to telegraph companies. The amount re-

ceived by Petitioner from this source has no connection with the charge made for telephone service. All receipts for telephone service furnished telegraph company customers are included in Petitioner's taxable gross receipts except where such service involved crossing the District line as described in 19, 20, 21 and 22 above. No part of this amount of \$17,372.27 was included in the original return filed by Petitioner.

34 "25/ On November 17, 1941 the Petitioner under written protest filed a supplementary return of gross receipts for the year involved, including therein its receipts described in paragraphs 19, 20, 21 and 22 and the commissions received from telegraph companies, described in paragraph 24, all of which receipts were omitted from the Petitioner's original return. Taxes were duly assessed by the Respondent on such receipts. On December 22, 1941 the Petitioner under written protest paid the said taxes and penalties assessed against it for the fiscal year 1941, said taxes amounting to \$57,992.92, with penalties thereon in the amount of \$1,159.86, making a total of \$59,152.78.

"26/ On January 20, 1942 the Petitioner timely filed its petition appealing from the assessment of the following taxes and penalties and requesting a refund of all of said amounts:

Gross Earnings Taxes

Fiscal Year	Tax	Penalties	Total
1939	\$8,115.18	\$2,109.94	\$10,225.12
1940	8,646.00	1,210.44	9,856.44
			\$20,081.56

Gross Receipts Taxes

Fiscal Year	Tax	Penalties	Total
1941	\$57,992.92	\$1,159.86	\$59,152.78
Grand Total			\$79,234.34

The foregoing stipulation of facts has been accepted and agreed to by the parties to this proceeding as evidenced by signatures of counsel affixed hereto."

35

Opinion

The taxes here assailed are additional gross earnings taxes for the fiscal years 1939 and 1940 imposed by the Act of July 1, 1902 (32 Stat. 590, 619), and an additional gross receipts tax for the fiscal year 1941 under Title IV of the District of Columbia Revenue Act of 1939. (Title 47, Sec. 1701, D. C. Code, 1940 Ed.) which repealed the Act of July 1, 1902.

36 The Board will separately consider the two classes of taxes here involved.

Gross Earning Taxes

Act of July 1, 1902

One question only is presented in relation to the gross earnings taxes, namely, was the amount expended by the petitioner for the paper, printing, binding and transportation of its telephone directory a proper deduction in computing "gross earnings", either under the interpretation of that term by the Courts of the District of Columbia or because of the contemporaneous construction thereof by the assessing authority? The petitioner insists that the question be answered in the affirmative on both grounds, while the respondent contends that neither resort to judicial interpretation nor the consideration of the contemporaneous construction by the Assessor justifies such answer.

The pertinent portion of the act of July 1, 1902, is Paragraph 5 of Section 6. It reads as follows:

"Each national bank as the trustee for its stockholders, through its president or cashier, and all other incorporated banks, and trust companies, in the District of Columbia, through their presidents or cashiers, and all gas, electric lighting, and telephone companies, through their proper officers, shall make affidavit to the

board of personal-tax appraisers on or before the first day of August each year as to the amount of its or their gross earnings for the preceding year ending the thirtieth day of June, and shall pay to the collector of taxes of the District of Columbia per annum on such gross earnings as follows: Each national bank, and all other incorporated banks, and trust companies, respectively, six per centum; each gas company, five per centum; each electric lighting, and telephone company, four per centum."

Judicial Interpretation—As to judicial interpretation of the term "gross earnings" both parties rely upon that portion of the opinion in *District of Columbia v. Georgetown Gas Light Company*, 45 App. D. C., 63, following:

"Taking paragraph 5 of section 6 of the act of July 1, 1902, in its ordinary sense, it is certainly free from ambiguity. It taxes national banks, other incorporated banks, trust companies, gas companies, electric lighting companies and telephone companies upon their 'gross earnings'. It taxes street railroad companies and insurance companies upon their 'gross receipts'. There is a full recognition by the Congress of a distinction between 'gross receipts' and 'gross earnings.' Is not that distinction as expressed in this statute a natural and sensible one? Take the case of a bank which lends \$100,000 of its capital stock on the first day of January, and receives back its \$100,000 plus \$3,000 in interest on the first day of July. It certainly could not have been intended to treat the 'gross receipts' of \$103,000 as 'gross earnings', for if that should be so, the tax upon those 'gross receipts' as equivalent to 'gross earnings' would be \$5,150, or nearly twice as much as the actual interest or profits received. It is obvious then that the expression 'gross earnings', when applied to the bank, must mean the gross amount earned from the use of its capital, or the use of such money on deposit with it as it is entitled to treat in the same manner for investment as it does its capital. And if 'gross earnings' does not mean 'gross receipts' when applied to the bank, of course it can not mean 'gross receipts' when applied to the manufacturing corporation engaged in the produc-

tion and sale of gas. The one term is applied to both of them to measure their personal taxes, and it must consequently be applied with the same meaning."

* * * * *

"In fact, all of the federal cases cited by the appellant, excepting two (and neither of those affecting the point in issue here), were cases in which railroads and their receipts or earnings were involved, and therein lies the misconception of the appellant in this case. It may very well be that 'gross earnings' and 'gross receipts' constitute precisely the same sum of money with certain sorts of business concerns. A railroad company engaged entirely in the rendition of services for which it receives compensation, and neither producing nor furnishing any tangible commodity to persons as an incident to the rendition of the services, may have as its 'gross receipts' and its 'gross earnings' precisely the same moneys. But, it does not follow that every concern will have as its 'gross receipts' and its 'gross earnings' precisely the same thing."

38 The Board is bound by the Georgetown Gas Light Company case. As the Board reads the opinion of the Court of Appeals in that case it decides, as far as pertinent to this proceeding that (a) Paragraph 5 of Section 6 of the Act of July 1, 1902, is not ambiguous, (b) A Utility which produces or furnishes a "tangible commodity to persons as an incident to the rendition of services" may deduct the cost of the raw materials consumed in the production of such "commodity" in computing gross earnings, and (c) If services only are rendered by the utility its "gross earnings" and "gross receipts" will be the same amount, that is to say, no deduction will be allowed.

The Petitioner compresses its contention in the statement in its brief following: "Petitioner is engaged in the furnishing of telephone service, but as a necessary incident it furnishes *a commodity* to its subscribers, that is to say, *a telephone directory*. The items deducted are the bare costs of raw material—paper, printing, binding and transportation." (Emphasis supplied)

Is the telephone directory of the petitioner a "tangible commodity" furnished its subscribers "as an incident to the rendition of services," as contemplated by the opinion of the Court of Appeals? If it is, clearly the deduction here claimed should have been allowed, otherwise, not. An adequate answer to the question requires a consideration of the nature and purpose of a telephone directory and its relation to the primary service rendered by the petitioner.

At this point it should be said that the fact that the petitioner sells advertising space in the directory is unimportant. It is a fortuitous circumstance that the petitioner is able to realize a substantial amount from
39 that source, but it can in nowise affect the right of the petitioner to the claimed deduction. If the petitioner's position, as above stated, is sound, it is entitled to the deduction regardless of the fact that it sells advertising space. If it had discontinued such practice during the taxable years involved its right, if any, to the deduction could not have been affected. The Board therefore will ignore such fact in arriving at its conclusion.

The telephone directory furnished by the petitioner to its subscribers is a list of subscribers. It is essential to the proper rendition of the petitioner's services. When the service is inaugurated in respect of a particular subscriber, the directory, along with certain instruments, boxes, wires and other material, is furnished the subscriber. Such material is used by the subscriber while the contract for telephone service is in force, during all of which time the petitioner owns such material. At the conclusion of the service such material, including the directory, is returned to the possession of the petitioner. Nothing physical or tangible is ever sold to the subscriber. The only difference between the directory and the other material furnished the subscriber is that from time to time the directory becomes obsolete because of new subscribers or discontinuance of service to others, and is taken up by the petitioner and substituted by a new or current directory. Such substitution

occurs several times each year, and in respect of all of its subscribers entails a large expenditure of money. On the other hand change or substitution of other material furnished is rare. The material furnished by the petitioner to its subscribers in connection with its services, including the directory, is not manufactured or produced by the petitioner. The directory is produced by or under the direction of the Western Electric Company. The petitioner pays that manufacturer for the directory as a finished product. The price therefor is determined by the cost to the Western Electric Company of the paper, printing, binding and transportation. Such four items are here claimed by the petitioner as "raw materials", and the amount so paid by it to the Western Electric Company as a proper deduction in computing its "gross earnings." The petitioner did not deduct, or claim as a deduction the other items of expense connected with the directory, such as the cost of compilation and distribution.

The respondent urges several reasons why the deduction here claimed by the petitioner should not be allowed. In the first place, it says that inasmuch as the petitioner did not manufacture the directory books, but bought them as a finished product from the Western Electric Company, it expended no funds for "raw material." Secondly, it insists that even if the petitioner be considered as the manufacturer or producer of the books, it could in no event claim as a deduction any sum greater than that expended for the "raw material" used in the production, namely, the paper. Lastly, the respondent urges its primary objection that under no conditions can the directory be considered as a "commodity" produced or furnished by the petitioner to its subscribers, as contemplated by the opinion in Georgetown Gas Light Company case. The Board does not consider it necessary to consider the first two points made by the respondent, since the Board believes that its third contention is sound.

Practically applied, the decision in the Georgetown Gas Light Company case means, in the opinion of the Board,

that if, for instance, a bank should loan a sum of money which was repaid with interest, it may deduct the amount loaned; that, if a gas light company sells gas and receives payment therefor it may deduct the cost of raw material used in producing that commodity; or, if the
 41 gas light company sells gas appliances, such as stoves, ranges and the like, and receives payment therefor, it may deduct the cost of such merchandise; or, in other words, such bank or utility does not begin to receive "gross earnings" until it has recovered its capital invested in the loan or commodity as the case may be.

The petitioner is engaged in supplying telephone service. It is not in the business of selling, nor does it sell telephone directory books. Such books are furnished as an essential aid to its service, without which the service would be practically useless. The books belong to it, and are delivered to the subscribers under a bailment. True, its money, and perhaps some of its capital is expended in compiling the information contained in the directory, in procuring the directory from the Western Electric Company and in distributing it to its subscribers, but the same is true in respect of the purchase of the transmitters, receivers and other equipment left with the subscribers, and of the payment of other necessary expenses of operation, all of which is expected to be returned out of the receipts from telephone service to the subscribers. Of course, the directory and the equipment left with the subscriber differ, in that the replacement of the former is by far more frequent than that of the latter, but the difference is in degree only and is not essential.

The directory is not, as the petitioner contends, "a tangible commodity" furnished to persons as an incident to the rendition of the services. It is "tangible", but is not a
 42 "commodity" in the sense used in the Georgetown Gas Light Company case. That is clear from a reading of the opinion in that case. The Court of Appeals, through Mr. Chief Justice Covington, had in mind the ordinary acceptation of that term when used in relation

to commerce, namely, a movable that is bought and sold. To follow the petitioner's argument logically would lead to the conclusion that in computing gross earnings the petitioner could deduct the cost of the telephone equipment left with the subscriber, the electric and gas light companies the cost of electric and gas meters; and the street railway company the cost of tickets, since each of such is something "tangible" furnished "persons as an incident to the rendition of the services." Examples could be multiplied, but enough have been cited to show the fallacy of the petitioner's argument.

Contemporaneous Construction. — The Assessor, whose duty it was to administer Paragraph 5 of Section 6 of the Act of July 1, 1902, prior to the fiscal year ending June 30, 1939, construed it as permitting the petitioner in computing "gross earnings" to deduct the cost of the directory to the extent here claimed. The Assessor went so far as to prepare and furnish the forms allowing such deduction. Such construction related to the fiscal years ending June 30, 1931, 1932, 1933, 1934, 1935, 1936, 1937 and 1938, a period ensuing after the decision of the Court of Appeals in the Georgetown Gas Light Company case. The construction placed upon the law by the Assessor was evidently an interpretation of that decision.

The petitioner insists that the construction of the statute given by the Assessor over so long a period of time should not now be disturbed, and should have the force of law.

43 The petitioner bolsters its contention by reasserting that the Assessor's construction had statutory support and correctly interpreted the ruling in the Georgetown Gas Light Company case. Moreover, it says that it "is a regulated public service corporation and its rates are established by a government regulating body. The taxes and penalties on directory costs, which for the years here involved amounted to \$20,081.56, were not treated as expenses for these years and hence were not recovered by Petitioner through its rates for telephone service."

The respondent opposes the application of the rule of contemporaneous construction on ground that the statute is plain and unambiguous, and held to be so by the Court of Appeals, leaving no room for the invocation of the rule; and that the action of the Assessor in construing the statute and interpreting the decision in the Georgetown Gas Light Company case was erroneous and a plain mistake of law.

It is a well settled rule of statutory construction that where the language of a statute is ambiguous or uncertain the interpretation placed upon it by the officer whose duty it is to enforce it, and as evidenced by a continued course of custom or practice, is not only entitled to great weight, but in most, if not all, instances, controlling, especially if contracts have been entered into or position of parties has been changed on the faith of such contemporaneous construction.

Bardwell v. Petty, 52 App. D. C. 310, 286 Fed. 772;

Wright v. Wardman, 55 App. D. C. 318, 5 F (2d) 380;

Wilbur v. Texas Co., 59 App. D. C. 317, 41 F (2) 111;

United States v. A. G. S. R. R. Co., 142 U. S. 615;

44 *United States v. Healey*, 160 U. S. 136; *Hawley v.*

Diller, 178 U. S. 476; *C. Q. C. Mining Co. v. Arizona*, 206 U. S. 476; *United States v. Cerecedo Hermanos, etc.*, 209 U. S. 337; *United States v. Jackson*, 280 U. S. 183; *Luchenbach S. S. Co. v. U. S.*, 280 U. S. 173.

The rule of contemporaneous construction, however, does not apply where the language of the statute is clear and unambiguous. *Houghton v. Payne*, 194 U. S. 88. Such is the rule in the District of Columbia. In *Potomac Electric Power Co. v. Hazen*, 67 App. D. C., 90 F. (2d) 406, the United States Court of Appeals for the District of Columbia was called upon to consider an assessment made by the Assessor for the first time in 1934 against the Power Company under the statute here involved, in the face of a contemporaneous interpretation and custom to the contrary of more than thirty years standing. During that period the rates for electricity charged consumers in the District of Columbia

was fixed in relation to expenses, including taxes. During the entire thirty year period the Assessor construed the Paragraph 5 of Section 6 of the Act of July 1, 1902, as requiring the taxation of "gross earnings" from activities within the District of Columbia only. In 1934 the Assessor revised such construction and practice and retroactively assessed the Power Company a tax on its entire gross earnings, including those from the sale of electricity and rental of property in Maryland. The Power Company invoked the rule of contemporaneous construction, but the Court of Appeals denied its application and stated:

45 "But the plaintiff insists that the doctrine of contemporaneous construction is applicable and should control. 'Rules of statutory construction are never used to create, but only to remove a doubt.' *Wilbur v. United States*, 58 App. D. C. 347, 30 F. (2d) 871. 'It is only where the language of the statute is ambiguous and susceptible of two reasonable interpretations that weight is given to the doctrine of contemporaneous construction.' *Houghton v. Payne*, 194 U. S. 88, 24 S. Ct. 590, 593, 48 L. Ed. 888. The language of paragraph 5 of section 6 of the act of 1902, as amended, is not ambiguous. It provides for an affidavit by each utility company within its terms 'as to the amount of its or their gross earnings,' and requires the payment of a tax measured on such gross earnings. The statute is all inclusive—covering gross earnings from whatever source. * * *

At the outset of the discussion of Paragraph 5 of Section 6 of the Act of July 1, 1902, in the Georgetown Gas Light Company case, Mr. Chief Justice Covington stated that such paragraph, as far as the present inquiry is concerned, was not ambiguous. Surely, it can not be said that the Chief Justice "muddled the waters" or left the law ambiguous. The fact that the Assessor misunderstood its import is not enough to show that. In the opinion of the Board the law was not ambiguous or uncertain, and any possible doubt that might have existed before the decision in the Georgetown Gas Light Company case was dissipated

thereby. The contemporaneous construction by the Assessor, upon which the petitioner relies, was clearly erroneous. Such erroneous interpretation indulged in by the taxing authority of the District of Columbia for almost a decade can not estop the District from assessing a tax clearly imposed by law. *Bank of Hawaii v. Wilder*, 8 F (2d) 845; *Cooley on Taxation*, 4th Ed. Sec. 61 and Sec. 1009; 61 *Corpus Juris*, 87.

The petitioner insists that the equities of the situation require a holding in its favor. It observes that the additional "gross earnings" taxes for the fiscal years 1939 and 1940 amounted to \$20,081.56, and that if the As-
 46 sessor had currently assessed such taxes they would have been considered in fixing the rates for telephone service. It complains that the assessment of the additional taxes after the close of respective years prevented recovery of that expense through its rates for telephone service. The Board believes such point is without merit. In the first place the additional taxes amounted to about \$10,000 a year, and it is difficult to understand how such item of expenses could affect rates charged by a utility of the magnitude of the petitioner; secondly, it is not shown that any rate making proceeding was in progress during those years or for many years before. Lastly, it must not be overlooked that in the *Potomac Electric Power Company* case the amount of additional taxes was vastly greater, and the taxable period involved much larger than in this proceeding, and yet the Court of Appeals held the taxes valid.

For the reasons stated the Board must hold that the additional "gross earnings" taxes for the fiscal years 1939 and 1940 and penalties thereon in the total sum of \$20,081.56, and here involved, were valid and not erroneously collected by the District of Columbia from the petitioner.

Gross Receipts Tax
Title IV, District of Columbia
Revenue Act of 1939

When this proceeding was filed there was presented for solution under this portion of the opinion two questions, namely, (a) whether the gross "receipts tax" under Section 2(a) of Title IV of the District of Columbia Act of 1939, hereinafter called "Title IV" could be assessed in relation to the sum of \$17,372.27 paid petitioner by telegraph companies for the services of the former in charging, billing, collecting etc. amounts due the latter for telegrams sent by petitioner's subscribers through the telephones, and (b) whether Title IV imposes a tax in relation to moneys received by the petitioner for services in connection with telephone messages crossing the District of Columbia boundaries, hereinafter called "District line". The respondent has conceded that the tax measured by the sum of \$17,372.27 representing payment by telegraph companies for the services of the petitioner as stated above is invalid and that petitioner is to that extent entitled to a refund amounting to \$694.89 plus a penalty of \$13.90 or a total tax and penalty of \$708.79. The Board agrees with the respondent and so holds. There is left for answer, therefore, the second question only.

Cross-line Services.—All of petitioner's plant and facilities are located within the District of Columbia. Its revenues, except those mentioned in the paragraph immediately preceding, are derived from services, which for the purposes of this proceeding may be classified as follows:

48 The first class is what might be called purely local telephonic services, namely begun and completed within the District. The petitioner duly reported gross receipts from such services and paid the tax measured thereby for the fiscal year 1941. There is no dispute concerning that tax. The other class, herein called "cross-line services" consisted of telephonic services which (a) began in

the District and terminated outside (b) began outside and terminated in the District, and (c) began and terminated without the District, but routed through over the facilities of the petitioner. The moneys received by the petitioner covered services performed by the petitioner in relation to such cross-line services by or through its facilities in the District of Columbia. The revenues from such second class of services were not originally reported by petitioner to the Assessor nor was any tax originally paid in relation thereto. The additional "gross receipts" tax here assailed was later assessed by the Assessor in relation to such revenues.

In assessing the additional "gross receipts" tax here involved the Assessor purported to act under, and the petitioner in its attack relies upon that portion of Title IV reading as follows:

49 "Each national bank as the trustee for its stockholders through its president or cashier, and all other incorporated banks, and trust companies, in the District of Columbia, through their presidents or cashiers, and all gas, electric lighting, and telephone companies, through their proper officers, shall make affidavit to the board of personal-tax appraisers on or before the first day of August each year as to the amount of its or their gross earnings or gross receipts, as the case may be, for the preceding year ending the 30th day of June, and each national bank and all other incorporated banks and trust companies respectively shall pay to the collector of taxes of the District of Columbia per annum 6 per centum on such gross earnings and each gas company, electric lighting company, and telephone company shall pay to the collector of taxes of the District of Columbia per annum 4 per centum on such gross receipts, from the sale of public utility commodities and services within the District of Columbia."

The petitioner here insists that the cross-line services described above were not "services within the District of Columbia" as contemplated by Title IV, or, if such cross-line

services are included in the term "services within the District of Columbia", the law is unconstitutional. The respondent squarely denies the validity of such contention.

All of the gross receipts upon which the tax here under consideration was measured were derived from the activities or services performed or rendered by the petitioner by or through its telephone facilities in the District of Columbia, except a small portion paid to it for billing, collecting and accounting for cross-line services originating in the District, which was offset by similar services rendered for its account by connecting lines in relation to cross-line services beginning without the District. No part of the tax here involved was measured upon the moneys due and paid to connecting lines for the services performed by them.

The tax here assailed is an excise tax imposed upon the petitioner for the privilege of exercising its franchise and corporate activities within the District of Columbia. As stated above it is measured by the amount of gross receipts from "services within the District of Columbia". The first inquiry is whether under the language of Title IV the petitioner's gross receipts from cross-line services is taxable.

50 Considering the plain language of Title IV, namely, "services within the District of Columbia", and the fact the cross-line services rendered by the petitioner were activities carried on exclusively within the District, the conclusion is irresistible that Title IX imposes a tax measured by the gross receipts from such cross-line services, and the Board so holds. Whether Title IV is constitutional, that is to say, whether Congress had the power to impose a tax on gross receipts from a transaction crossing the District line into a state is another question which the Board will now consider.

For a great many years the Supreme Court adhered to the rule that a state could not constitutionally impose an excise tax measured by gross receipts from interstate transactions and business. The rationale of such holding was that there was no insulation between the impact of the tax

and the source of the gross receipts, as in the case of an income tax, so that the tax was a direct interference with interstate commerce, prohibited by the Commerce Clause. That view continued at least down to *Adams Mfg. Co. v. Storen*, 304 U. S. 307. The complexion of the decisions of that court, however, changed and we find Mr. Chief Justice Stone in *Western Live Stock v. Bureau of Revenue*, 303 U. S. 250, stating:

“It is for these reasons that a state may not lay a tax measured by the amount of merchandise carried in interstate commerce, *State Freight Tax*, supra, or upon the freight earned by its carriage. *Fargo v. Michigan*, supra; *Philadelphia & S. S. S. Co. v. Pennsylvania*, supra, restricting the effect of *State Tax on Railway Gross Receipts*, 15 Wall. 284, with which compare *Miller, J.*, dissenting in that case at p. 297. Taxation measured by gross receipts from interstate commerce has been sustained when fairly apportioned to the commerce carried on within the taxing state, *Wisconsin & M. R. Co. v. Powers*, 191 U. S. 379; *Maine v. Grand Trunk Railway*, supra; *Cudahy Packing Co. v. Minnesota*, supra; *United States Express Co. v. Minnesota*, 223 U. S. 335, and in other cases has been rejected only because the apportionment was found to be inadequate or unfair. *Fargo v. Michigan*, supra; *Galveston, H. & S. A. R. Co. v. Texas*, supra; *Meyer v. Wells, Fargo & Co.*, supra, with which compare *Wisconsin & M. R. Co. v. Powers*, supra. Whether the tax was sustained as a fair means of measuring a local privilege or franchise, as in *Maine v. Grand Trunk Railway*, supra; *Ficklen v. Shelby County Taxing District*, supra; *American Manufacturing Company v. St. Louis*, 250 U. S. 459, or as a method of arriving at the fair measure of a tax substituted for local property taxes, *Cudahy Packing Co. v. Minnesota*, supra; *United States Express Company v. Minnesota*, supra; cf. *Postal Telegraph Cable Co. v. Adams*, supra; see *McHenry v. Alford*, 168 U. S. 651, 670-671, it is a practical way of laying upon the commerce its share of the local tax burden without subjecting it to multiple taxation not borne by local commerce and to which it would be subject if gross receipts, unapportioned, could be made

the measure of a tax laid in every state where the commerce is carried on."

The later case of *Gwin, White & Prince v. Henneford*, 305 U. S. 434, did not impair the decision in the *Western Live Stock* case, since the tax involved was held to be unconstitutionally invalid, because it was measured on the entire gross receipts from the interstate business, and not apportioned as in the present proceeding. The old rule was invaded farther by the decision in *McGoldrick v. Berwind-White Mining Co.*, 309 U. S. 33. The gross receipts from the entire cross-line business was as observed above, apportioned among the petitioner and its connecting lines on a basis which was acceptable to them and which appears reasonable to the Board. Since the Tax here involved was imposed in accordance with such apportionment it would have to be sustained constitutionally, even if the District were a state.

What doubts there may be concerning the constitutional validity of the tax is dissipated by the reading of that group of cases recently decided by the United States Court of Appeals for the District of Columbia, holding that Congress had the power as the local legislature of the District of Columbia to impose an excise tax for the privilege of doing business in the District measured by gross receipts
 52 from transactions and business crossing the District line. *Neild & Sauerhoff v. D. C.* 71 App. D. C. 306; 110 F. (2d) 246; *General Electric Co. v. D. C.*, 71 App. D. C. 321, 110 F. (2d) 261; *General Electric Supply Co. v. D. C.*, 71 App. D. C., 322, 110 F. (2d) 262; *Colgate Palmolive Peet Co. v. D. C.* 71 App. D. C. 324, 110 F. (2d) 264; *Butler Brothers v. D. C.*, 71 App. D. C. 326, 110 F. (2d) 266; *California Packing Co. v. District of Columbia*, 73 App. D. C. 53, 115 F. (2d) 946. *Panitz v. District of Columbia* 74 App. D. C. 284, 122 F. (2d) 61. (See also *Inter-Island Nov. Co. v. Hawaii* 305 U. S. 306).

For the reasons stated the Board must hold that the additional "gross receipts" tax and penalties thereon for

the fiscal year 1941, in the total amount of \$59,152.78, were not invalid and were not erroneously collected by the District of Columbia from the petitioner, and that the petitioner is not entitled to any refund on account thereof, except in the amount of \$708.79, as hereinbefore held.

Decision will be entered in accordance with this opinion.

(S) JO MORGAN

Member Sole

* * * * *

53

DECISION.

This proceeding came on to be heard upon the petition filed herein, and upon consideration thereof and of the evidence adduced at the hearing on said petition, it is by the Board this 10th day of September, 1942.

Adjudged and Determined That no sum as additional "gross earnings" taxes and penalties thereon for the fiscal years ending June 30, 1939 and June 30, 1940 was erroneously collected by the District of Columbia from the petitioner, and that the petitioner is not entitled to a refund on account thereof

And It Is Further Adjudged And Determined That an additional "gross receipts" tax for the fiscal year ending June 30, 1941, in the amount of \$694.89, plus a penalty in the amount of \$13.90, or a total tax and penalty in the amount of \$708.79 was erroneously collected by the District of Columbia from the petitioner; and that the petitioner is entitled to a refund of such total sum.

54 And It Is Further Adjudged And Determined That the balance of the additional "gross receipts" tax and penalties thereon for the fiscal year ending June 30, 1941, assessed against and collected from the petitioner by the District of Columbia, and involved in this proceeding, were not erroneously collected by the District of Columbia

from the petitioner; and that the petitioner is not entitled to any refund on account thereof.

JO MORGAN

Member Sole

September 10-1942.

* * * * *

55

PETITION FOR REVIEW.

Taxpayer, the Petitioner in this cause, by R. A. Van Orsdel, counsel, hereby files its petition for a review by the United States Court of Appeals for the District of Columbia of the decision of the Board of Tax Appeals for the District of Columbia rendered September 10, 1942 determining that additional gross earnings taxes and penalties for the fiscal years ending June 30, 1939 and June 30, 1940, referred to herein as fiscal years 1939 and 1940, were lawfully assessed against the Petitioner by the Assessor of the District of Columbia and collected from it by the Collector of Taxes of the District of Columbia for said fiscal years in the amounts of \$10,225.12 and \$9,856.44 respectively and further determining that additional gross receipts taxes and penalties for the fiscal year ending June 30, 1941, referred to herein as fiscal year 1941, were lawfully assessed against the Petitioner by the Assessor of the District of Columbia and collected from it by the Collector of Taxes of the District of Columbia for said fiscal year in the amount of \$58,443.99.

I

The Petitioner is a corporation duly organized and existing under the laws of the State of New York, with its principal office located at 725 Thirteenth Street, Northwest, in the City of Washington, District of Columbia and is engaged in furnishing telephone service in said District of Columbia.

This controversy involves the interpretation of two taxing statutes of the District of Columbia, first, the Act of July 1, 1902 which imposed a tax of four per cent per annum on the gross earnings of this Petitioner and second, Title IV of the District of Columbia Revenue Act of 1939, which repealed the aforementioned gross earnings tax and imposed a tax of four per cent per annum on the gross receipts of this Petitioner from the sale of public utility commodities and services within the District of Columbia. The facts involved are not in controversy as same have been agreed to by counsel for the respective parties and filed and accepted herein by stipulation.

(a) In its original returns of gross earnings for the fiscal years 1939 and 1940 filed as required by the Act of July 1, 1902 Petitioner deducted from its total gross receipts the cost of raw materials consumed in the manufacture of telephone directories, a publication of Petitioner containing an alphabetical listing of its subscribers with the address and telephone number opposite the name of each and other information of value to the users of telephone service in the District of Columbia, and paid the taxes reflected thereon at the times provided by law. The deduction of such costs in arriving at gross earnings was in accordance with instructions furnished Petitioner by the Assessor of the District of Columbia on the forms used by Petitioner in filing its returns, which instructions had been effective for all fiscal years prior thereto, beginning with the fiscal year 1931. In the opinion of Petitioner such deduction was also in accordance with the Act imposing said tax as interpreted by the Court of Appeals for the District of Columbia. For

the fiscal years 1939 and 1940 the Assessor of the
57 District of Columbia required Petitioner to file supplemental returns of gross earnings reflecting as taxable the items of directory costs deducted in the original returns as aforesaid, which items were in the amount of \$202,879.51 for the fiscal year 1939 and \$216,150.08 for the fiscal

year 1940, and thereafter said Assessor imposed taxes and penalties thereon in the total amount of \$20,081.56, and on December 22, 1941 Petitioner under written protest paid to the Collector of Taxes of the District of Columbia the total amount of said assessment of taxes and penalties and appealed therefrom to the Board of Tax Appeals for the District of Columbia.

(b) In its original return of gross receipts from the sale of public utility commodities and services within the District of Columbia for the fiscal year 1941, filed as required by Title IV of the District of Columbia Revenue Act of 1939, Petitioner did not include its gross receipts from interstate telephone service furnished by it, that is to say, its gross receipts from telephone business originating within the District and terminating elsewhere, or originating elsewhere and terminating in the District, or business neither originating nor terminating in the District but routed through the District in the course of passage. Petitioner paid the taxes assessed on said original return at the times required by law. Petitioner did not include in its original return gross receipts from such interstate business because Title IV of the District of Columbia Revenue Act of 1939, which repealed the Act of July 1, 1902 as aforesaid, limited and restricted the gross receipts levy to gross receipts "from the sale of public utility commodities and services within the District of Columbia", and in the opinion of

58 Petitioner the Legislature added this restrictive phrase to the taxing statute (said phrase not being present in the Act repealed) in order to eliminate interstate business from the tax and confine said tax to the local business of Petitioner. Such interpretation of the wording employed in Title IV of the District of Columbia Revenue Act of 1939 is in accordance with decisions of the Court of Appeals for the District of Columbia and is the interpretation accorded state statutes containing similar or identical wording by the State Courts, as well as by the Supreme Court of the United States. The Assessor of the District of Columbia required Petitioner to file a supple-

mental return for the fiscal year 1941 reflecting as taxable all gross receipts from interstate business omitted in the original return, as aforesaid, which for the year involved amounted to \$1,435,787.31, and thereafter said Assessor imposed taxes and penalties thereon in the amount of \$58,443.99, and on December 22, 1941 Petitioner under written protest paid to the Collector of Taxes of the District of Columbia the total amount of said assessment of taxes and penalties and appealed therefrom to the Board of Tax Appeals for the District of Columbia.

III

Petitioner being aggrieved by the conclusions of law contained in the opinion of the Board of Tax Appeals for the District of Columbia, and by its decision entered in pursuance thereto on September 10, 1942, desires to obtain a review thereof by the United States Court of Appeals for the District of Columbia.

IV

Wherefore this Petition is respectfully presented.

(S) R. A. VAN ORSDEL
Counsel for Petitioner
 725 13th Street N. W.,
 Washington, D. C.

59 District of Columbia, ss:

R. A. Van Orsdel, being duly sworn, says that he is counsel of record in the above cause; that as such counsel he is authorized to verify the foregoing petition for review; that he has read the said petition and is familiar with the statements contained therein; and that the statements made are true to the best of his knowledge, information and belief.

(S) R. A. VAN ORSDEL

Subscribed and sworn to before me this 6th day of October, 1942.

(S) HUGH W. SMITH
Notary Public, D. C.

BRIEF FOR RESPONDENT

IN THE
United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA

UNITED STATES
COURT OF APPEALS FOR THE
DISTRICT OF COLUMBIA
FILED FEB 20 1943

No. 8390

Joseph W. Harrison

THE CHESAPEAKE AND POTOMAC TELEPHONE
COMPANY, *Petitioner,*

v.

DISTRICT OF COLUMBIA, *Respondent.*

On Petition for Review of Decision of the Board of Tax
Appeals for the District of Columbia.

RICHMOND B. KEECH,
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Principal Assistant Corporation Counsel, D. C.,
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IN THE
United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA

No. 8390

THE CHESAPEAKE AND POTOMAC TELEPHONE
COMPANY, *Petitioner,*

v.

DISTRICT OF COLUMBIA, *Respondent.*

On Petition for Review of Decision of the Board of Tax
Appeals for the District of Columbia.

ADDITIONAL STATEMENT OF CASE

The Respondent accepts the statement of the case contained in Petitioner's brief with the following qualifications and additional statement:

(a) *Tax Liability of "Gross Earnings" Statute.*

The statement that for the fiscal years 1939 and 1940 Petitioner, in its original return, deducted from total revenues raw material costs incurred in the manufacture and publication of telephone directories, should be modified to read the raw material costs "incurred by the printer" in the manufacture or publication of directories.

The telephone directories were published by an independent contractor under a contract between the printer and the Western Electric Company and were purchased by the Petitioner from the Western Electric Company as a finished product. (Paragraph 9 of the Stipulation; page 25 of the Appendix to Petitioner's brief.)

(b) *Tax Liability under "Gross Receipts" Statute.*

The Act of July 26, 1939, which repealed and modified the "gross earnings" statute did not impose a direct tax upon the Petitioner by name, but imposed a franchise tax upon telephone companies measured by 4% of the gross receipts.

The Petitioner did not include in its original return for the fiscal year 1941 revenues received by it for services performed by it within the District of Columbia in rendering telephone services beginning in the District and terminating outside the District, or beginning outside the District and terminating in the District, or beginning and terminating outside the District but routed through the District over the facilities of the Petitioner. (Paragraph 17 of the Stipulation; page 28 of the Appendix to Petitioner's brief.)

All of the Petitioner's plants and facilities are located within the District of Columbia. (Paragraph 16 of the Stipulation; page 28 of the Appendix to Petitioner's brief.) All of the services performed by the Petitioner are performed within the District of Columbia and all revenues taxed by the Assessor were for services rendered by the Petitioner over its own facilities within the District of Columbia. (Paragraphs 19, 20, 21, and 22 of the Stipulation; pages 28, 29, 30, and 31 of the Appendix to the Petitioner's brief.)

SUMMARY OF ARGUMENT

"Gross Earnings" Statute. Gross earnings means such earnings without deductions for ordinary and necessary operating expenses. Only the cost of raw materials purchased by a gross earn-

ings taxpayer and used by it in the manufacture of a finished product may be deducted from gross receipts in order to determine gross earnings. The Petitioner is not a manufacturer, it sells no commodities and purchases no raw materials. Since the directories were bought by Petitioner as a finished product, it had no raw material costs to be deducted from gross receipts. The Petitioner may not deduct from its gross receipts the cost of paper, printing, binding and transporting the finished product bought by it from Western Electric Company, who contracted with the printer under an independent contract for the publication of directories. If the Petitioner may deduct such costs, then it may deduct the cost of raw material entering into all finished products bought by it, such as telephone sets and equipment. The Petitioner is a public utility rendering service and does not sell a commodity.

Contemporaneous Construction or Administrative Practice. Paragraph 5 of Section 6 of the Act of 1902 is not ambiguous. Language imposing a tax measured by gross earnings is plain and simple and leaves no room for construction. It is only where the language of a statute is ambiguous and susceptible of two or more reasonable interpretations that weight is given to the doctrine of contemporaneous construction. Contemporaneous construction or administrative practice may never be used to create, but only to remove, a doubt. Neglect of administrative officials, failure to act, a misunderstanding of the law, or failure to properly apply a statute do not constitute administrative construction or rulings. Long-continued practice by administrative authorities cannot alter provisions that are clear and explicit. A failure to enforce the law does not change it. Administrative practice cannot thwart the plain purpose of a valid law.

"Gross Receipts" Statute. Title IV of the District of Columbia Revenue Act of 1939 imposes a tax on the gross receipts "from the sale of public utility commodities and services within the District of Columbia." The business of the Petitioner is the transmission of telephone messages. Its services can be performed only where its facilities are located. All of Petitioner's facilities are located in the

District of Columbia and all of its public utility services are performed entirely within the District.

By limiting the tax to gross receipts from the sale of public utility commodities and services "within the District of Columbia" Congress merely intended to exclude from the tax base receipts from the sale of public utility commodities without the District or from services actually performed without the District.

There has been no apportionment or allocation of Petitioner's gross receipts. Petitioner has no receipts which could be the proper subject of apportionment. Petitioner does not transmit messages beyond the District line and none of its receipts are for the transmission of messages or the performance of services beyond the District line.

ARGUMENT

I.

Gross Earnings Statute

In its original returns reporting gross earnings for the purpose of determining its tax liability under the provisions of paragraph 5, Section 6 of the Act of July 1, 1902, (32 Stat. 590, 619) the Petitioner deducted from its gross receipts \$202,879.51 for the fiscal year 1939 and \$216,150.08 for the fiscal year 1940, as representing the cost of paper, printing, binding and transporting telephone directories. These deductions were made on the theory that such costs represented the cost of raw materials entering into the manufacture or publication of the directories.

But paragraph 9 of the stipulated facts (page 25 of the Appendix to the Petitioner's brief) shows that the directories were printed and published for the Petitioner by an independent contractor under a contract between the printer and the Western Electric Company, that the Petitioner paid the Western Electric Company for the directories "as a finished product", and that the amounts deducted from gross receipts,

as above stated, "represent amounts expended by the printer for paper, printing, binding and transportation" in connection with the directories.

Paragraph 1 of the stipulated facts (page 21 of the Appendix to the Petitioner's brief) shows that the Petitioner "is a public utility engaged in the business of furnishing communication service in the District of Columbia". Paragraph 8 of the Stipulation (pages 24 and 25 of the Appendix to the Petitioner's brief) shows that directories are furnished to the Petitioner's subscribers with no specific charge therefor.

It is obvious from the foregoing stipulated facts that the Petitioner is engaged in rendering service and that it is not engaged in the manufacture of anything; that it does not buy any raw materials; that it sells no commodities except its service; and that it did not incur the cost of paper, printing, binding or transporting the directories, except to the extent that such costs as well as all other costs are reflected in the purchase price of the "finished product", just as is true of all equipment and every product bought by any purchaser.

To support its deductions of the cost of paper, printing, binding and transporting directories, the Petitioner relies upon the decision of this Court in *District of Columbia v. Georgetown Gaslight Company*, 45 App. D. C. 63. From that decision the Petitioner argues that the principle applied to a manufacturing concern which buys raw materials and *converts them into a salable commodity* should apply to a public utility which is engaged "in the business of furnishing communication service". In the *Georgetown Gaslight* case it is shown that the Company furnished to the Assessor a statement showing the total sales from gas and by-products manufactured by the Company during the year and the cost of *the raw materials actually entering into the manufacture of the gas sold*, and that by deducting the cost of the raw materials from gross receipts the Company found and reported its gross earnings. The statute there involved is the same statute involved in the in-

stant case. In the decision in that case Mr. Chief Justice Covington said:

"The one question presented by the record in this case is whether or not, in assessing the appellee the personal tax on its '*gross earnings*' * * * the assessor, in determining what were the gross earnings, should have allowed the appellee to deduct from the gross receipts from its sales of gas and by-products the amount of the expenditures for the raw material from which the appellee company manufactured its gas * * *."

The expenditures for raw material referred to in the above quotation were *expenditures made by the Gas Company* for raw material purchased by it from which it "manufactured its gas" and sold it to the public as a commodity. The Petitioner in the instant case made no such expenditures for raw material, and it used none. The stipulated facts show that the Petitioner bought the directories "as a finished product", not from the printer, but from the Western Electric Company.

On page 15 of its brief before this Court the Petitioner refers to the Court's analogy of a bank lending its capital and getting back interest at the end of six months, and pointed out that the tax could not be applied to the gross receipts at the end of six months, which represented a capital loan as well as the interest received. But there is no analogy between a bank and the Petitioner. If there be an analogy, it lies in the fact that the telephone set and wires on the customer's premises represent the capital or the loan, and these are returned to the Petitioner when service is discontinued. There has been no effort on the part of the Assessor to tax the telephone set or wires on the customer's premises, which in the analogy with the bank, corresponds to the capital loan.

If there is an analogy between the Petitioner and banks, it might be pointed out that banks do not deduct from their gross receipts the cost of paper, printing, binding and trans-

porting their books, check books, and other printed forms in determining gross earnings. Significantly enough, in the quotation giving the analogy of the bank, this Court said:

“And if ‘gross earnings’ does not mean ‘gross receipts’ when applied to the bank, of course it cannot mean ‘gross receipts’ when applied to *the manufacturing corporation engaged in the production and sale of gas.*” (Italics supplied.)

It will be noted in the sentence hereinabove quoted that the Court there referred to a *manufacturing corporation engaged in production and sale*. The Petitioner neither manufactures nor sells a commodity to its customers. Even the telephone set and the conductors in the residences are not sold to its subscribers, but belong to the Petitioner. All the Petitioner sells is service, for which the subscriber pays a monthly rate. When the service contract expires, the Petitioner removes the telephone set and the conductors and collects the directory. When the Georgetown Gaslight Company sold gas, the customers paid for it and consumed it—a finished product—a salable commodity.

In the *Georgetown Gaslight* case the Court was speaking of a commodity which the Company produced by a process of manufacture “by converting raw materials which had been purchased”. But here it was the printer who bought the raw materials and converted them into the directories, and, under the doctrine of the *Georgetown Gaslight* case, it is he who would be entitled to the deductions from gross receipts for the cost of raw materials in order to establish gross earnings. If the printer were a District of Columbia resident subject to the gross earnings tax, he would be entitled under the doctrine of the *Georgetown Gaslight* case to deduct the cost of raw materials before he would be subject to the gross earnings tax. In such event, would the Petitioner by the purchase of “the finished product” be permitted also to deduct the cost of raw

materials? If so, the cost of raw materials would be twice deducted. In the assumption made, would both the Western Electric Company and the Petitioner, as well as the printer, be entitled to deduct from gross receipts the cost of raw materials in order to determine gross earnings? That would be the consequence of Petitioner's argument if the printer and the wholesaler were residents of the District of Columbia subject to the gross earnings tax. A gross earnings taxpayer is not entitled to deduct payments made to another gross earnings taxpayer in respect to the subject matter out of which the earnings of each arise. *State v. Railway Express Agency*, 210 Minn. 556, 299 N. W. 657; *Cin., M. & L. Traction Company v. State*, 94 Ohio St. 24, 113 N. E. 654; *Commonwealth v. U. S. Express Company*, 157 Pa. St. 579, 27 A. 396; *Peninsula Transit Corp. v. Commonwealth*, 165 Va. 614, 183 S. E. 446.

If the Petitioner's contention is sound, it follows that every gross earnings taxpayer who buys a "finished product" is entitled to deduct the cost of raw materials entering into the manufacture of the finished product. If the principle of the *Georgetown Gaslight* case is to be applied to the Petitioner's purchase of directories, it follows that purchasers of gas—the finished product—would for the same reason be entitled to deduct the cost of raw materials in the determination of gross earnings.

If the Petitioner may deduct from its gross receipts the cost of paper, printing, binding and transporting directories, is there any reason why it should not deduct the cost of raw materials used in the manufacture of telephone equipment—the switchboard, telephone sets, cables, conductors, poles and all other equipment? The Petitioner purchases all of its telephone equipment from the Western Electric Company as finished products, just as it does directories. If the decision of the *Georgetown Gaslight* case permits the Petitioner to deduct the cost of paper, printing, binding and transportation of directories, it would permit the Petitioner to deduct the cost of raw material in all telephone equipment it purchases from the Western

Electric Company. It would permit the deduction of the cost of paper, printing and transporting its monthly statements, which are also incident to its business. That deduction has not been claimed. On page 12 of its brief, Petitioner says that it furnishes directories "as a necessary incident" to its service. All of the telephone equipment is necessary to its service, and if the Petitioner is entitled to deduct the cost of raw material for that which is only "incident" to its business, then it would also be entitled to deduct the cost of raw material in telephone sets, switchboards, etc., which are both incident to and necessary in the service.

If there be a reason for the claimed deductions from gross receipts, the same reason would permit the Capital Transit Company to deduct the cost of paper, printing and transporting the weekly passes it sells over its lines and the thousands of daily transfers it issues (for which no specific charge is made) and the raw material cost of tokens it sells.

Under no stretch of the imagination can the cost of printing, binding and transporting be deemed cost of "raw materials". These items represent labor costs. The only item which bears even a remote similarity to raw materials as used in the *Georgetown Gaslight* case is paper. But the Petitioner did not buy the paper.

There is a significant and parallel analogy drawn by this Court in the *Georgetown Gaslight* case, and that is the analogy of railroads. In drawing that analogy, the Court said:

"A railroad company *engaged entirely in the rendition of services* for which it receives compensation, and neither producing nor furnishing any tangible commodity to persons as an incident to the rendition of the services, *may have as its 'gross receipts' and its 'gross earnings' precisely the same moneys.* * * * So that, while in the case of certain classes of concerns, such as railroads, *producing no commodities*, there are only two classes of funds into which the entire receipts are divided, one being the 'gross receipts' or

'gross earnings,' as you please to denominate them, and the other being the 'net earnings' after all taxes, charges, and operating expenditures are paid, in those *manufacturing concerns which produce commodities for sale* by converting raw materials there are, of necessity, three distinct classes of funds into which their entire receipts are divided, 'gross receipts,' 'gross earnings,' and 'net earnings.' " (Italics supplied.)

Railroads, like the Petitioner, render service. Both the Petitioner and railroads are public utilities; neither is a manufacturing concern; neither buys raw materials for conversion into the service they sell; both receive regulated compensation for services rendered to the public. The only difference is the kind of service rendered. In the analogy of the railroads lies the real application of the *Georgetown Gaslight* case to the instant case.

In *District of Columbia v. Washington Gaslight Company*, 45 App. D. C. 78, this Court followed its decision in the *Georgetown Gaslight* case and certiorari was denied by the Supreme Court, 241 U. S. 676.

The Petitioner says that the furnishing of telephone directories is a necessary incident to its telephone service. It may be added that railroads also furnish as necessary incidents to the rendition of service tickets, tariffs, time tables, freight bills and many other printed forms which are incident to and a necessary part of the services rendered to the public. But the courts have never held that cost of paper, printing, binding and transporting railroad tickets, time tables, tariffs, bills of lading and all the other numerous forms used by railroads "in the rendition of services" is deductible in arriving at gross earnings subject to tax. This is illustrated in *Great Northern Railway Company v. Minn.*, 216 U. S. 206, and *Great Northern Railway Company v. Minn.*, 278 U. S. 503, where a property tax was imposed upon railroads measured by gross earnings. No deductions were made in the determination of gross earnings for the cost of paper, printing, binding and transporting

the many forms incident to and necessary in the rendition of the public utility service to determine gross earnings.

In *Cin., M. & L. Traction Co. v. State, supra*, an excise tax on gross earnings was involved. The traction company leased tracks and equipment from another transportation company and when it made a report of its gross earnings, it deducted from the gross receipts the rental paid to the other company. The Supreme Court of Ohio said the sole question was whether or not, under the statute, the several amounts paid as rental should have been included in the gross earnings reported. The traction company contended that gross earnings were earnings after payment of rental for leased tracks and equipment. The court said the paramount purpose of the state in assessing the tax was to assess with reference to the amount of business done by the company, and concluded that as to the amount of business done, it would base the assessment on "gross earnings" of the company. If this were net earnings, it would be more difficult of determination, for there would need to be deducted interest on its mortgage, or its bonds, expense of maintenance, motor power, rolling stock, office charges, etc. The court then said:

"But the language, 'gross earnings' clearly requires that no deduction shall be made for any of these, or for rentals of any of its connecting lines used or operated by such public utility company, * * *."

The court held that rentals must be included in gross earnings, but no claim was made that the cost of paper, printing, binding and transporting tickets, time tables, bills of lading and other forms should be deducted from gross receipts to determine gross earnings. So in *McHenry v. Alford*, 168 U. S. 651, 42 L. Ed. 614, no claim was made that expenses should be deducted by the railroads for paper, printing, binding and transporting tickets and other forms in determining the gross earnings subject to tax. In *Cudahy Packing Co. v. State of*

Minn., 246 U. S. 450, a gross earnings tax imposed by the State of Minnesota was involved. The company packed meats and other articles of commerce and sold them throughout the United States, using its own line of refrigerator cars wherein the products were shipped, using railroads. No claim was made or allowed for paper, printing, binding or transporting such articles which were incident to and necessary in rendering the service. Railroads are, like the Petitioner, utilities rendering services, and none of them is a manufacturing plant producing a salable commodity from raw materials.

In *State v. United Electric Light & Water Co.*, 90 Conn. 452, 97 A. 857, the Supreme Court of Connecticut said that gross earnings in a statute laying a tax upon gross earnings means *the entire earnings* from all operations and not such earnings less operating expenses, taxes and bad debts. Gross earnings are entire earnings without deductions for expenses incurred. The taxpayer there was a public utility furnishing *service*. In *Kaufman v. Reubin*, 103 N. J. Eq. 14, 141 A. 786, the court said that gross earnings "are the total receipts before deducting expenditures", in quoting from Black's Law Dictionary. In *First Trust Co. of St. Paul v. Commonwealth Co.*, 98 F. (2) 27, the Eighth Circuit said that gross earnings means earnings without deductions for expenses. The court there said the use of the word "gross" carries a strong implication against any deductions. A common definition of "gross" is "without deduction". In *Col. Ry., Gas & Electric Co. v. Jones*, 119 S. Car. 480, 112 S. E. 267, the court said gross income means the total receipts from the business before deducting expenditures for any purpose. The taxpayer was a public utility furnishing *service*. The statute involved in the instant proceeding imposes a tax measured by gross earnings, not net earnings. What the Petitioner seeks is to apply the tax to something less than gross earnings.

The case of *Ill. Central R. R. Co. v. State of Minn.*, 309 U. S. 157, 60 S. Ct. 419, involved tax on gross earnings derived from "operation within the state." The question before the court

arose from the application of the five percent tax on the net credits for the exchange of freight cars. The railroad was charged with such percentage of the credit balance owing from each road using its cars as was determined by ascertaining the ratio of each using road's Minnesota revenue freight car miles to its system car miles. The net credits to the railroad were taxed. The total debits and credits represented use of cars in other states as well as in Minnesota. The net credits represented payments to the railroad for the use of its freight cars by other roads which operated in the state. The court said that the statute reaches only revenues derived from operations in the state, and that the railroad was not taxed on all of its credit balances but only on that portion which accrued as a result of the use of its cars by other railroads in the State of Minnesota. There was no claim and no allowance made for deductions for expenses of operation such as the cost of paper, printing, binding and transportation. The taxpayer was a public utility rendering *service*, a railroad utility, which this Court said may have as gross earnings and gross receipts "precisely the same moneys". The tax imposed by the 1902 Act is a franchise tax, as has been held several times. A franchise tax is for the privilege of exercising its franchise. *Postal Telegraph Cable Co. v. Adams*, 155 U. S. 688, 39 L. Ed. 311.

In *Potomac Electric Power Co. v. Rudolph and Washington Ry. & Electric Co. v. Rudolph*, 58 App. D. C. 261, 29 F. (2) 634, certiorari denied, 278 U. S. 656, the Power Company contended that interest and dividends received from investments, and rent received from land, buildings and equipment constituted no part of gross earnings under the same Act here involved. This Court said:

"In effect, we are asked to write into this statute words limiting the measure of the excise to gross earnings of the company in the production of electric power. This we may not do. *The distinction between gross receipts and gross earnings as applied to manufacturing corporations* was considered in District

of *Columbia v. Georgetown Gaslight Co.*, 45 App. D. C. 63. There is no contention here that the District in determining the amount of the gross earnings of the Power Company has failed to permit the company to *deduct amounts spent in the purchase of raw materials used in the production of electric power*. Unless, therefore, the meaning of gross earnings in this statute is to be so restricted as to frustrate the apparent intent of Congress as expressed in the terms of the statute, interest and dividends received from investments and rent received from land, buildings, and equipment were rightly included as part of the gross earnings of the company." (Italics supplied.)

Here again this Court clearly indicated that the decision in the *Georgetown Gaslight* case meant nothing more than it there said, to wit, that the cost of raw materials may be deducted from gross receipts in determining gross earnings of one who manufactures raw materials into a finished product. The statute there involved is the same statute involved in the instant case, and there this Court said that no deductions should be allowed for taxes, repairs and maintenance on buildings and equipment. The effect of that decision is that operating expenses, such as the cost of directories, is not a proper deduction in the determination of gross earnings. That decision was in accord with the general rule that expenses are not deductible in determining gross earnings except for the cost of raw materials bought and used in the production of a product that is salable. In 19 C. J. 855 gross earnings is defined as the total receipts of a business or company before deducting expenses.

In *Security Savings & Commercial Bank v. D. C.*, 51 App. D. C. 316, 279 F. 185, the bank contended that earnings received from liberty bonds, victory bonds, war savings stamps and certificates of indebtedness of the United States, which, under the law providing for their issuance, are exempt from taxation, should not be included in gross earnings to determine the tax under the same statute here involved. This

Court said the amount of the tax fluctuates with the amount of business transacted and is measured by it. The judgment of the lower court in dismissing the suit to recover the taxes paid on these amounts was sustained by this Court. The Court said: "Here the tax is measured by the amount of the gross earnings."

In *Fort Smith Gas Co. v. Wiseman*, 189 Ark. 675, 74 S. W. (2) 789, the Supreme Court of Arkansas said a railroad and a street railway sold "service", and, quoting from an old decision, held that *gross earnings and gross receipts are the same thing for utilities "selling service"*. That is the same language used by this Court in the *Georgetown Gaslight* case. In the *Fort Smith Gas* case the Court said gross earnings of a utility meant—

"* * * the entire receipts, without deduction for any expenditure, or any cost of operation, or other expense or cost of the service."

It is clearly evident from the stipulated facts in this case and court decisions that telephone directories constitute part of the services furnished, that the directories are not sold but are bailed to subscribers. In *Masterson v. C. & P. Tel. Co.*, 55 App. D. C. 23, 299 F. 890, this Court said that a telephone company is required to furnish reasonable telephone facilities and that a subscriber "was entitled to have his name in and to be furnished with directories containing his name and the number of his telephone, properly arranged." In *Calif. Fireproof Storage Co. v. Brundige*, 199 Cal. 185, 248 P. 669, the Supreme Court of California said:

"A telephone directory is an essential instrumentality in connection with the peculiar *service which a telephone company offers* for the public benefit and convenience. It is as much so as is the telephone receiver itself, which would be practically useless for the receipt and transmission of messages without the

accompaniment of such directories." (Italics supplied.)

In *Natl. Telephone Directory Co. v. Dawson Mfg. Co.*, 214 Mo. App. 683, 263 S. W. 483, the court said a telephone company is merely a bailee of its directories. In *Riaboff v. Pac. Tel. & Tel. Co.*, 39 Cal. App. 775, 102 P. (2) 465, the court said a telephone directory is an essential instrumentality in connection with the telephone service. The clear implication of all these cases is that the directory constitutes a part of the service furnished by the Petitioner, just as do the telephone sets in the homes or offices of subscribers. In all court decisions relating to telephone companies the business engaged in is referred to as "service" or "services rendered". This is illustrated in the cases hereinabove cited and *Miller v. Central Carolina Telephone Co.*, 194 S. Car. 327, 8 S. E. (2) 355; *Hotel Pfister v. Wisc. Telephone Co.*, 203 Wis. 20, 233 N. W. 617; *Bell Tel. Co. of Pa. v. Pa. Public Utility Commission*, 135 Pa. Sup. Ct. 218, 5 A. (2) 410, and *Mich. Bell Tel. Co. v. Mich. Public Service Commission*, 297 Mich. 92, 297 N. W. 198. References in the Communications Act of 1934 show that telephone companies are engaged in the business of selling or rendering service and not in producing or selling commodities.

There are some states that have a manufacturers' tax or a producers' tax, but the writers of this brief have found no case in which telephone companies were taxed upon the production or manufacture of telephone directories as a commodity. If the District of Columbia had a manufacturers' tax, it is reasonable to ask whether the Petitioner would admit that its directories would be subject to such a tax. The writers of this brief have found no case where a telephone company has been permitted to make deductions for the cost of paper, printing, binding and transporting directories in the determination of gross earnings. The Petitioner has cited no such case in its brief.

Even though no case has been cited where telephone directories have been held to constitute commodities, the Petitioner contends that furnishing directories to its subscribers constitutes the furnishing of commodities. As elsewhere herein shown, directories constitute a part of *the service* furnished by Petitioner. The word "commodity" in its ordinary connotation means an article of trade or commerce, a movable article that is bought and sold. *U. S. v. Sisco*, 262 F. 1001; *Queens Insur. Co. v. State*, 86 Tex. 250, 24 S. W. 397; *People v. Federal Security Co.*, 255 Ill. 561, 99 N. E. 668; *Rohlf v. Kase-meier*, 140 Iowa 182, 118 N. W. 276. If the Petitioner furnishes a commodity, it is the service it renders. In *McKinley Tel. Co. v. Cumberland Tel. Co.*, 152 Wis. 359, 140 N. W. 38, the court said the furnishing of telephone *service* may be classed with the general terms of the statute as the supplying of a commodity constituting a subject of commerce.

II.

Contemporaneous Construction or Administrative Practice

The Petitioner contends that the Respondent cannot as a matter of law reverse its long-continued interpretation of the statute involved. It says that from 1931 through 1940 it had been deducting the cost of paper, printing, binding and transporting directories in the determination of its tax liability under the gross earnings statute, and argues that by this administrative practice the Respondent may not now correct that practice to determine the correct tax.

It should be stated that the administrative practice followed from 1931 through 1940 was not by interpretation, but by practice alone. As will be shown elsewhere herein by reference to court decisions, a mere *practice* does not constitute *interpretation*. There had been no administrative interpretation of the gross earnings statute in respect of the claimed deductions until the matter was submitted by the Assessor to

the Corporation Counsel, who in an opinion dated April 18, 1941, advised the Assessor that the statute did not permit the deduction of the cost of paper, printing, binding and transporting the directories. As a result of such official interpretation, the Assessor on April 25, 1941, advised the Petitioner that the claimed deductions were not permitted under the statute. It is stated on page 16 of the Petitioner's brief that the interpretation prior to April 25, 1941, was because of the decision of this Court in the *Georgetown Gaslight* case. This does not seem to be a reasonable statement for the reason that the *Georgetown Gaslight* case was decided in 1916. If the Petitioner was entitled to the claimed deductions, why did it not claim those deductions after the decision of the *Georgetown Gaslight* case in 1916, instead of waiting until 1931?

The Petitioner points to the form submitted by the Assessor for the purpose of making returns under the gross earnings statute. Neither the Petitioner nor the Respondent in this proceeding knows how the particular form originated. But this Court in *Potomac Electric Power Co. v. Hazen*, 67 App. D. C. 161, 90 F. (2) 406, said the statute here in question provides for an affidavit by each utility company as to the amount of its gross earnings and requires the payment of a tax measured on such gross earnings. If the Petitioner did not report its correct gross earnings, it has been acting in violation of the law.

Regardless of who originated the form which permitted the deductions in 1931, the form itself is not important if it does not contain a statement of gross earnings, as this Court has said the statute requires. In *Thompson v. Ky.*, 209 U. S. 340, 52 L. Ed. 822, suit was brought by the state to collect interest on deferred taxes for a three-year period. The defendant, Thompson, alleged in his answer that he made the reports required of him "upon blank forms furnished by the auditor of public accounts, who was charged with the duty of supervising the collection of all taxes", and that the law had been construed by all the officers of the state government since its

enactment several years previously to require the payment of only the principal amount of the taxes without the exaction of interest or penalties. He further alleged in his answer that the tax should have been paid by the owner of the property stored in his possession, and that he, the defendant, had lost his right of a lien upon the property for the tax. But the Supreme Court of the United States sustained the state court in assessing interest on the deferred taxes and held that due process does not assure to a taxpayer the interpretation of a statute by executive officers against the interpretation by the courts or relief from consequences of a misinterpretation by either.

In *Potomac Electric Power Co. v. Hazen*, *supra*, the Electric Power Company made a similar contention in respect of a contemporaneous construction involving the same statute here involved. The Power Company had from the beginning made its reports of gross earnings by omitting all gross earnings from operations outside the District of Columbia. But in 1935 the District of Columbia insisted that the Company should report all of its gross earnings from whatever source, and made an assessment accordingly. The Company brought its bill to set aside and declare null and void the assessment and taxes levied on its gross earnings from the sale of electricity in the State of Maryland, and from rent of land, buildings and equipment within that state. The Company insisted, among other things, that the administrative practice should control. In answer to this contention, this Court said:

“But plaintiff insists that the doctrine of contemporaneous construction is applicable and should control. ‘Rules of statutory construction are never used to create, but only to remove, a doubt.’ *Wilbur v. United States*, 58 App. D. C. 347, 30 F. (2d) 871. ‘It is only where the language of the statute is ambiguous and susceptible of two reasonable interpretations that weight is given to the doctrine of contemporaneous construction.’ *Houghton v. Payne*, 194 U. S. 88, 24

S. Ct. 590, 593, 48 L. Ed. 888. The language of paragraph 5 of section 6 of the act of 1902, as amended, *is not ambiguous*. It provides for an affidavit by each utility company within its terms 'as to the amount of its or their gross earnings,' and requires the payment of a tax measured on such gross earnings. The statute is all inclusive—covering gross earnings from whatever source." (*Italics supplied.*)

For all the years prior to 1935 the Power Company had omitted part of its gross earnings in making its report, but that did not serve to save it from the provisions of Paragraph 5 of Section 6 which "is not ambiguous". It was by mere failure to administer and apply the plain wording of the statute that the practice had grown up.

In *Ill. Central R. R. Co. v. State of Minn.*, *supra*, the State of Minnesota in 1922 imposed a gross earnings tax upon the railroad, which was first required of every railroad in the year 1913. For nine years the railroad had failed to include in its gross earnings debits and credits representing the use of its cars rented to other railroads and operated in the State of Minnesota. The state attempted to collect past due taxes because of the failure of the railroad to include in its gross earnings net credits for operation of its cars within the state. The railroad contended that it was a retroactive tax. For nine years the railroad had escaped taxes on these items. The Supreme Court of the United States said:

"We have here at most a mere recomputation by the state of taxes payable under a statute which was existent throughout the whole period in question. Neglect of administrative officials, misunderstanding of the law, lack of adequate machinery, have never been constitutional barriers to a state reaching backward for taxes."

In contrast with the *Illinois Central Railroad* case, it should be noted that the Respondent in the instant proceeding is not

attempting to collect taxes from the Petitioner from the year 1931. The only taxes involved under the 1902 Act are the taxes for the two fiscal years 1939 and 1940.

In *State v. Northwestern Telephone Exchange Co.*, 107 Minn. 390, 120 N. W. 534, the statute involved imposed a three percent gross earnings tax on all telephone companies. The Company contended that its earnings from interstate business were not subject to the gross earnings tax. Prior to the action in this case for taxes due for the year 1904, no request had been made on the Company for the tax on its earnings "except those derived exclusively from telephone business beginning, continuing, and ending within the limits of the state of Minnesota", except for the first return filed by the Company in 1898. At that time the matter was submitted to the Attorney General of the state, who stated that it was his opinion that the tax "was probably not collectible", and nothing was done about it until this action started in 1904. The Act involved was the Act of 1897, and the Company was required under the law to make its first return in 1898. The Telephone Exchange Company made much of the practical construction which had been given to the statute by the executive offices of the state, but the court said that such argument "can have little force under the circumstances". In that case no deductions were claimed or made for cost of paper, printing, binding and transporting directories.

In the *Northwestern Telephone Exchange* case there was an opinion by the Attorney General of the state that the tax was probably not collectible, and no effort was made to collect the tax on the receipts from interstate business from the passage of the Act of 1897 until the return for the year 1904. In contrast, the Petitioner in the instant proceeding can point to no such opinion. So far as the record shows, the first administrative "interpretation" on the particular question here involved was the opinion dated April 18, 1941, involving the Petitioner's tax liability for the fiscal years 1939 and 1940. Administrative construction may never be used for the purpose of defeating a

statute. "Neglect of administrative officials, misunderstanding of the law", do not preclude Respondent from determining the Petitioner's correct tax liability. *Illinois Central Railroad case, supra.*

In *Union Stock Yard & Transit Co. v. U. S.*, 308 U. S. 213, 60 S. Ct. 193, the Supreme Court said mere inaction, through failure of the Interstate Commerce Commission to institute proceedings, "*is not an administrative ruling and does not imply decision as to the Commission's jurisdiction.*" (Italics supplied.)

In *Louisville & Nashville R. R. Co. v. U. S.*, 282 U. S. 740, 51 S. Ct. 297, the Supreme Court said:

"Long-continued practice and the approval of administrative authorities may be persuasive in the interpretation of doubtful provisions of a statute, but cannot alter provisions that are clear and explicit when related to the facts disclosed. A failure to enforce the law does not change it. The good faith of the carriers in the transactions of the past may be unquestioned, but that does not justify the continuance of the practice."

As was said by the Supreme Court in *Norwegian Nitrogen Products Co. v. U. S.*, 288 U. S. 294, 53 S. Ct. 350:

"True indeed it is that administrative practice does not avail to overcome a statute so plain in its commands as to leave nothing for construction."

In *Neuberger v. Commissioner of Internal Revenue*, 311 U. S. 83, 61 S. Ct. 97, the court said great weight has been attached to administrative practice and treasury rulings, "but beyond question they cannot narrow the scope of a statute when Congress plainly has intended otherwise." To the same effect is *Rasquin v. Humphreys*, 308 U. S. 54, 60 S. Ct. 60. In *Sanford's Estate v. Commissioner of Internal Revenue*, 308 U. S. 39, 60 S. Ct. 51, the court stated the general rule as to

administrative practice in determining the construction of statutes of doubtful meaning, and said that courts are not bound to accept administrative construction regardless of consequences, *even when disclosed in the form of rulings*, and cites in support thereof *Helvering v. N. Y. Trust Co.*, 292 U. S. 455, 54 S. Ct. 806.

These citations could be multiplied many times. It is significant that in all such cases where administrative ruling or administrative practice is accepted as an aid in construction, the statute is ambiguous or of doubtful meaning. There is no ambiguity in Paragraph 5, Section 6, of the Act of July 1, 1902, under which the tax here involved was imposed. This Court in *Potomac Electric Power Co. v. Hazen*, *supra*, said:

“The language of paragraph 5 of section 6 of the act of 1902, as amended, is not ambiguous. It provides for an affidavit by each utility company within its terms ‘as to the amount of its or their gross earnings,’ and requires the payment of a tax measured on such gross earnings.”

The statute specifically says the tax shall be on “gross earnings”. There can be doubt as to that clear statement in the Act. In the *Georgetown Gaslight* case this Court said Paragraph 5 of Section 6 “is certainly free from ambiguity”. The only reason the Petitioner had been permitted to make deductions for the cost of paper, printing, binding and transporting its telephone directories in the past was because of the lack of proper application of the statute. As in *Union Stock Yard & Transit Co.* case, *supra*, it was due to the mere inaction or failure of the officials to require the report of gross earnings that the administrative practice has grown up. As said in that case, mere inaction or failure to institute proceedings is *not administrative ruling*. The result is that there has been no administrative ruling on the matter of deductions for the alleged raw material costs, but in practice it was the failure to apply the statute rather than administrative construction or

interpretation of the language of the statute itself. For these reasons there has been no administrative construction of the 1902 Act which would establish the rule that great weight should be given to administrative construction. In no event may inaction or failure to institute proceedings result in narrowing a statute plainly stated by Congress to impose a tax on "gross earnings".

The Petitioner, on pages 17 and 18 of its brief, quotes liberally from *U. S. v. Alabama Great Southern R. R. Co.*, 142 U. S. 615, in support of its contention that an executive department could not change its interpretation of a statute where the parties who had acted on the faith of the old construction might be injured. A taxpayer is not injured by being compelled to pay the tax that Congress imposed. The Petitioner has failed to point out any administrative *ruling* or *construction* of the statute here involved. The only facts in this respect are that from 1931 to 1938, inclusive, the Petitioner, in making its returns or reports of gross earnings, made deductions for the cost of paper, printing, binding and transporting the directories. Nowhere is it stated that the Assessor had at any time reviewed the statute and issued a ruling or made an interpretation of the provisions of the statute in question. Nor has it been shown that the Assessor at any time has held that such items were deductible in determining gross earnings. Consequently, in the language of the *Union Stock Yard & Transit Co.* case, his inaction was "not an administrative ruling and does not imply decision" as to the deductibility of the items in question.

The *Alabama Great Southern R. R.* case does not support the contention of the Petitioner. In that case the court quoted the statute there involved and then pointed out at some length *three separate constructions* which might be given to the language of the statute. The statute in that case was ambiguous—so ambiguous in fact as to justify three different constructions. And the court pointed out that the third construction "was the construction given to it by

the Postmaster-General and by the accounting officers of the Treasury at the time the Act was passed". Subsequently the incumbent "reversed the rulings of his predecessors". In that case, therefore, the Postmaster General reviewed the Act when it was passed in 1876 and *made a definite ruling*. Then in 1885 when a new incumbent came into office, he reversed the rulings of his predecessors, and not only did he reverse the rulings, but withheld payment to the railroad for services covering the years from 1876 to 1885. It was in the light of these facts that the court said it is a settled doctrine of the court that "in case of ambiguity", the judicial department will lean in favor of a construction given to a statute by the department charged with the execution, and it will look with disfavor upon any "sudden change, whereby parties who have contracted with the government upon the faith of such construction may be prejudiced."

There is no ambiguity in a tax upon "gross earnings". If the Petitioner is required to pay a tax upon its "gross earnings", it has not been "prejudiced". There is no retroaction in the instant proceeding. But even so, as was said in *Illinois Central Railroad* case, neglect of administrative officials, misunderstanding of the law, are not barriers to a state reaching backward for taxes. The Petitioner, on page 20 of its brief, says that in the *Alabama Great Southern Railroad* case the executive department was not permitted to reverse its interpretation "primarily because rights had become vested on the basis of the old interpretation". The Petitioner has no vested rights in avoiding a tax. *Sturges v. Carter*, 114 U. S. 511, 29 L. Ed. 240. As pointed out hereinabove, there had been no interpretation of Paragraph 5, Section 6, of the 1902 Act as applied to the Petitioner until the Corporation Counsel rendered his opinion dated April 18, 1941. That constituted an administrative interpretation of the statute. And if administrative interpretation should govern, it is that interpretation rather than inaction or lack of proceedings that should aid in construing the statute.

The Petitioner states that it is a regulated public service corporation and its rates for telephone service are established by a governmental regulatory body, and apparently attempts to apply the "prejudice" theory referred to in the *Alabama Great Southern Railroad* case to the interpretation of the Act now sought. But it should be added that Petitioner's rates have not been the subject of investigation nor have they been changed as the result of the interpretation of the Act by the Corporation Counsel. It cannot be said that its telephone rates are based upon the administration of the Act by the Assessor. It would be just as logical to say rates should have been lower because Petitioner did not pay all taxes required under the law. It should be stated that the rates of the Petitioner have not been in question in all the years 1931 to 1940 during which the forms referred to were in use, nor have the rates been in question since the promulgation of the Corporation Counsel's opinion in 1941.

The court has said there is no ambiguity in this statute imposing a tax upon "gross earnings". The statute needs no interpretation. *Norwegian Nitrogen Products Co. v. U. S.*, *supra*. Where there is no ambiguity, administrative practice is not necessary in construing the statute. All that is required is a proper application of the statute to determine from the facts what constitutes "gross earnings". Administrative rulings cannot thwart the plain purpose of a valid law. *U. S. v. City and County of San Francisco*, 310 U. S. 16, 60 S. Ct. 749.

As previously shown in the *Alabama Great Southern Railroad* case, administrative interpretations and rulings were used as an aid in construction of an *ambiguous statute*. The Petitioner cites other cases which state the general rule. One of the latest such cases it cites is *Luckenbach Steamship Co. v. U. S.*, 280 U. S. 173, 50 S. Ct. 148. In that case the question involved was the proper rates to pay for carrying mail from ports in the United States to ports in the Canal Zone. In that case there were *formal written opinions interpreting the law*, by the Attorney General, the Labor Department and the

Comptroller General, as well as the Postmaster General. In 1909, the Act of March 2, 1905, had been interpreted by the Attorney General in a formal opinion to the Secretary of War to the effect that the Canal Zone was not a possession of the United States within the meaning of the Tariff Act. Again, in 1911, the Attorney General, in a formal opinion to the Postmaster General, held, to similar effect, that carrying mail from the United States to ports in the Canal Zone was carrying it to ports of foreign countries. By the Act of August 21, 1916, Congress provided that laws of the United States relating to seamen of vessels of the United States when on foreign voyages should apply to seamen of such vessels when in the Canal Zone. In 1925 the Department of Labor, in construing and interpreting the Immigration Act of February 5, 1917, ruled that ports in the Canal Zone were foreign ports. Then in 1926 the Comptroller General in a formal opinion held that, since ports in the Canal Zone are considered foreign ports, in the absence of special provision to the contrary, an alien seaman shipping on American vessels from a Canal port is limited in the matter of relief to such as may be extended to an alien seaman. Then in the Act of July 3, 1926, Section 4009 of the Act of 1872, under which the rates in question were fixed, was reenacted in a form "which undoubtedly puts ports in the Canal Zone on the same plane as foreign ports for the purposes of that section".

According to long-continued practice and *formal opinions* interpreting the statute, the Postmaster General prepared vouchers for paying to the Steamship Company the rates which had been determined under the many previous rulings and practices. But in spite of all these official and formal opinions, including one by the Comptroller General himself, to the contrary, the Comptroller General reversed them all and reduced the amount of the vouchers to fix the rate of pay as though the Canal ports were not foreign ports. Of course, the court, as in the case of all ambiguous statutes, relied upon the administrative interpretations and official rulings. But it

was not administrative inaction or neglect of action that aided the court. It sought the aid of administrative rulings because of the ambiguity of the statute and the formal reported opinions and interpretations of the act.

The other authorities cited by Petitioner, in support of its statement that administrative construction should govern, all deal with *ambiguous statutes* which had been made the subject of many *formal decisions and rulings* or had been litigated in the courts with judicial interpretation of their meaning. In *U. S. v. Jackson*, 280 U. S. 183, 50 S. Ct. 143, the Supreme Court of the United States said the purpose of the language used was not so plainly apparent as to preclude resort to judicial interpretation. The statute there involved had been made the subject of rulings by the Department of Interior, both under the particular statute involved as well as other statutes. The case of *Copper Queen Consolidated Mining Co. v. Ariz.*, 206 U. S. 474, 51 L. Ed. 1143, involved a statute of Arizona taken almost verbatim from a similar statute in Colorado. The statute had been construed in the highest courts in each state. The Supreme Court of the United States followed the interpretation of the state courts. In addition, the court said the board of equalization, whose duty it was to administer the act, had construed the act against the contention of the petitioner ever since the board was created. And the court said "certain weight attaches to this fact". The case of *Hawley v. Diller*, 178 U. S. 476, 44 L. Ed. 1157, involved an ambiguous statute which had been many times litigated and made the subject of formal *decisions* rendered by the Land Department after public hearings. The Court followed the executive construction contained in formal "decisions" and the judicial interpretation of the act. The case of *U. S. v. Cerecedo Hermanos y Compania*, 209 U. S. 337, 52 L. Ed. 821, involved the classification of imported goods under a treaty. The classification of the commodity was made by the appraisers at the port under the provisions of the Tariff Act, and upon that classification the duty was paid. In due time a protest was

made against the classification and the "decision" of the collector was reviewed by a board of appraisers. The court said Treasury decisions under the act were in accordance with the interpretations of long standing and "decisions" of the Treasury Department. "The first of these decisions was made in 1879." The court followed the decisions of long standing where interpretations had been made of the law. The case of *U. S. v. Healey*, 160 U. S. 136, 40 L. Ed. 369, involved a statute of doubtful meaning in which the practice of the department had not been uniform. In such a case, said the court, it would determine the true intention of the act of Congress respecting public lands without reference to the practice which had not been uniform.

All these authorities cited by the Petitioner in support of its contention in respect of administrative practice deal with statutes which the courts have found to be of doubtful meaning or susceptible to several different interpretations. And all of them involve *interpretations* and *decisions* by the executive departments as contrasted with mere inaction or lack of interpretation or rulings. The Respondent is in complete accord with the doctrine of these cases as applied to ambiguous statutes. This Court has twice said Paragraph 5 of Section 6 is not ambiguous. Therefore, the cases relied upon by the Petitioner are not applicable.

After quoting from the *Alabama Great Southern Railroad* case and other authorities cited, Petitioner says that in more recent years the court has strengthened the principle of the law concerning the constructions of the statute by holding that construction of a statute by a department charged with its enforcement and accepted for a long period of years becomes a part of the law the same as though it were written on the statute books, and cites in support thereof *Nashville, Chattanooga & St. Louis Ry. v. Browning*, 310 U. S. 362, 60 S. Ct. 968. The *Nashville, Chattanooga Ry.* case does not strengthen the established law that administrative interpretation is an aid in the interpretation of a doubtful statute. That principle of con-

struction needs no aid. Furthermore, the *Nashville, Chattanooga Ry.* case did not involve an ambiguous statute or one of doubtful meaning. The statement from that case quoted on page 19 of Petitioner's brief does not state the principle involved in that case nor the question presented to the court. The question before the court in that case was whether or not the application of a statute contravened the Federal Constitution. The court said it did not. The quotation from that case was merely addendum to what the court had decided. The decision of the court was upon the allegation of unconstitutionality and discrimination.

The *Nashville, Chattanooga Ry.* case involved a Tennessee statute that had been the law for 40 years. The statute specifically provides, as reference to the state court's decision in 176 Tenn. 245, 140 S. W. (2) 781 will more clearly show, that the Railroad and Public Utilities Commission of the state is required to assess for taxation at actual cash value all properties of public utilities there named. The assessment of property of others is made by local county officials and that assessment is required to be made upon the actual cash value. The complaint by the railroad in that case was that local county assessors did not assess property at its actual cash value and, because the Railroad and Public Utilities Commission did assess at actual cash value as required by the statute, the railroad had been discriminated against. No claim was made by the railroad that its property had been singled out from among other public service corporations for discrimination. The court stated that were it to take judicial notice of certain affidavits that local county officials did not assess at true value, "we should still find no denial of the equal protection of the laws." In that case there had been no reversal of administrative construction or interpretation. That question was not even before the court. Furthermore, as was pointed out by the Supreme Court, there were two classifications of property for taxation purposes: one relating to public utilities, and another

relating to other kinds of property. And as the court said, this system of differentiation

“has been ‘repeatedly brought to the attention of the General Assembly of the State of Tennessee’; has been left uncorrected by that body; and until the present case, so far as we are informed, has been unchallenged.”

It is obvious therefore that the administrative construction of the statute in that case had received legislative sanction and approval. This case can lend no comfort to the Petitioner and is not an aid in the construction of a statute which in clear and unequivocal language imposes a tax upon gross earnings.

III.

Gross Receipts Statute

All of Petitioner's plant and facilities are located in the District of Columbia and it owns no telephone lines extending beyond the boundaries of the District. (Par. 16 Stip., Pet. App. 28). Such facilities are used in connection with the transmission of several classes of telephone calls:

(a) Calls from one person in the District of Columbia to another person in the District of Columbia (Par. 17(a), Stip., Pet. App. 28).

(b) Long distance calls transmitted in part over the lines of the American Telephone and Telegraph Company. Such calls originating in the District of Columbia are transmitted from Petitioner's customers to its exchange facilities over its lines and are transmitted from its exchange facilities to the points of destination over the circuits of the American Company. Such calls originating without and terminating within the District are transmitted from the point of origin to the exchange facilities of the Petitioner over the circuits of the

American Company and are transmitted from the exchange facilities of the Petitioner in the District to the point of termination over the lines of the Petitioner. The Petitioner collects the toll charge on calls originating in the District and retains a part thereof for its services, based on a sliding scale of charges determined by the average amount per call collected from such calls during the monthly accounting period. The Petitioner does not receive a specific amount for the service it renders in terminating long distance calls in the District, but the part of the charges retained by the Petitioner on calls originating in the District of Columbia is to reimburse the Petitioner for handling both incoming and outgoing messages over the Petitioner's own facilities and for the expenses of billing, collecting, and handling. (Par. 19, Stip., Pet. App. 28-29).

(c) In certain instances long distance calls that originate outside the District and terminate outside the District in Maryland, Virginia, West Virginia or Delaware are transmitted over Petitioner's facilities. Such calls are transmitted to points within the District of Columbia over circuits of the American Company or an associated company, then from the said points in the District of Columbia to the District line over circuits of the Petitioner, and from the District line to points of termination over facilities of an associated company. In such cases the Petitioner is paid by the associated company for commercial expenses involved and a pro rata of line haulage. (Par. 20(a), Stip., Pet App. 29).

(d) In accordance with agreements between Petitioner and associated companies, certain long distance or toll calls are handled entirely over the facilities of the Petitioner and the associated companies and not over the circuits of the American Company. For such business the Petitioner receives an originating commission for calls originating within the District of Columbia plus a pro rata part of the line haulage, and also receives a pro rata part of the line haulage on calls originating elsewhere and terminating in the District. (Par. 20(b), Stip., Pet. App. 29-30).

(e) Telephone calls to and from the District of Columbia and certain exchange areas in nearby Virginia and Maryland are made on a message unit charge basis. Pursuant to the terms of contracts with associated companies, 85% of the message unit charge is retained by the company in whose territory the call originates, and the remainder is pro rated on the basis of line haul. For such business the Petitioner receives the originating commission of 85% of the charge on calls originating in the District plus a pro rate of line haulage and on calls originating elsewhere and terminating in the District of pro rate of line haulage. (Par. 21(a), Stip., Pet. App. 30).

(f) The Petitioner's subscribers in the District of Columbia have the privilege of calling certain subscribers in exchanges of associated companies in nearby Virginia and Maryland, and the subscribers in these exchange areas likewise have the privilege of calling District of Columbia subscribers, and the charge for this privilege is included in the regular telephone rate. This service is defined as the extended area service. Pursuant to contracts between the Petitioner and the associated companies, respectively, monthly settlements are made between the respective companies based on the number of calls from the exchange of one company to the other and on the line haul involved. (Par. 21(b), Stip., Pet. App. 30-31).

(g) In addition to its receipts from the above-described services, Petitioner has receipts from miscellaneous utility services rendered in connection with private lines extending from the District to points outside the District. The revenues received from this type of business are determined principally on the basis of line haulage plus appropriate originating commissions. (Par. 22, Stip., Pet. App. 31).

The local calls referred to in paragraph (a) are, of course, begun and completed within the District of Columbia and the right to tax the receipts therefrom is not here involved. Petitioner, however, contends that the receipts from services which it performs in connection with the calls described in paragraphs (b) to (g), inclusive, are not "from the sale of public

utility commodities or services in the District of Columbia" as contemplated by Title IV of the District of Columbia Revenue Act of 1939 [53 Stat. 1107, Sec. 47-1701, D. C. Code, 1940].

(a) *All of Petitioner's public utility services are furnished and performed in the District of Columbia.*

Petitioner makes frequent reference to the receipts described in the foregoing paragraphs (b) to (g), inclusive, as "interstate" receipts and argues that Congress did not intend to tax its receipts from interstate commerce. The statute here in question does not involve interstate commerce or interstate receipts. The tax is imposed upon gross receipts "from the sale of public utility commodities and services within the District of Columbia". The question then is: Where does Petitioner sell its commodities or perform its public utility services? The business of the Petitioner is the transmission of telephone messages. Its services can be performed only where its facilities are located. All of Petitioner's facilities are located in the District of Columbia and all of its public utility services are performed entirely within the District. Petitioner does not contend or suggest that any part of the receipts in question are for the performance of services or the sale of commodities without the District. Petitioner says (Pet. Brief, p. 9, 24, 27) that the situs of the business and not the location of its property should determine its liability for the tax. Respondent agrees that the location of the Petitioner's property does not determine its liability under the Gross Receipts Tax law. The tax is measured upon Petitioner's receipts from services which it performs in the District; thus the situs of such services determines the extent of liability. Since all its services are performed in the District the gross receipts derived therefrom are the proper measure of the tax.

(b) *Purpose of change in statute.*

The 1902 Act imposed a franchise tax upon the "gross earnings" of the Petitioner and other utility companies operating

in the District. The 1939 Act imposes the tax upon "gross receipts". The tax is limited to gross receipts "from the sale of public utility commodities and services", thereby eliminating receipts from non operating items. The tax imposed by the 1939 Act is further limited to gross receipts from the sale of public utility commodities and services "within the District of Columbia". By this limitation, Congress merely intended to exclude from the tax base receipts from the sale of public utility commodities without the District or from services actually performed without the District.¹

In the case of *Potomac Electric Power Company v. Hazen*, 67 App. D. C. 161, 90 F. (2d) 406, certiorari denied, 302 U. S. 692, this Court held that under the 1902 Act the Power Company was taxable upon its gross earnings from all sources including the sale of electricity in the State of Maryland and from rental of land, buildings and equipment within that State. Under the 1939 Act, the Power Company is not taxable upon receipts from the sale of electricity in the State of Maryland or from rental of land or buildings located in that State. There is, however, no analogy between the facts in the *Power Company* case and those in the case now before this Court. The Telephone Company makes no sales of public utility commodities or services without the District and, therefore, Petitioner was not affected by the decision in the *Power Company* case; it had previously reported all its gross earnings and continued so to do after the *Power Company* decision. Likewise, the limitation in the 1939 Act to receipts from sales of such commodities or services "within the District of Columbia" has no importance to the Telephone Company.

¹ The changes in the 1939 Act resulted from a study and report made under the direction of the joint committee on Internal Revenue Taxation, 76th Congress, 1st Session, House Document No. 108. In recommending the changes enacted as Title IV of the Act, the report states (p. 97):

"Present gross earnings and gross receipts taxes on the four major public utilities should be supplanted by a gross-receipts tax based exclusively on the sale of public utility services or commodities within the District of Columbia, allowing no deduction for the cost of raw materials. Deductions for sales made outside the District and for sales other than those of public utility commodities or services would be allowed."

In support of its contention that the receipts here involved are not taxable, Petitioner relies upon the cases of *Pacific Express Company v. Seibert*, 142 U. S. 339 and *Flowers et al. v. Pan American Refining Corp.*, Texas Ct. of Civ. Apps., 154 S. W. (2d) 982. The *Pacific Express Company* case involved a tax imposed by the State of Missouri upon the receipts of express companies from "business done within the State". The Express Company contended that the words "business done within the State" limited the tax to business begun and completed within the State and that a construction that the statute included any portion of its receipts from interstate commerce would make the statute unconstitutional. The Supreme Court avoided the constitutional question by holding that the words "business done within the State" meant business begun and completed therein. The language of the Missouri statute is quite different from the language of the District statute here involved and the gross receipts of the Petitioner here are from services performed entirely within the District as contrasted with the Express Company's receipts from interstate commerce.

The *Flowers* case, cited by Petitioner, involved a franchise tax determined by gross receipts from "business done in Texas". In 1935 the Attorney General of Texas construed the statute to include only business originating in and consummated in Texas. The Texas court adopted the State's construction in the case of *Clark v. Atlantic Pipe Line Co.*, 134 S. W. (2d) 322, 328. Thereafter the State Auditor adopted a view contrary to that which had been followed by the taxing authorities pursuant to the opinion of the Attorney General in 1935. The Auditor, in 1938, contended that there should be included in the tax base a portion of the gross receipts of the corporation from its interstate business. The Court said that the statute probably was susceptible of the interpretation contended for by the Auditor, but held that it was precluded from adopting such an interpretation because of the other interpretation continuously given to it by the authorities

charged with its enforcement, and the earlier decision of the court in the *Atlantic Pipe Line* case. This case is of no value to the Petitioner here for the reasons that the Texas statute involved is quite different from the District statute here involved, and the case was decided on the basis of the prior administrative construction.

The District of Columbia Business Privilege Tax was likewise imposed upon gross receipts derived from business in the District of Columbia. The tax upon that portion of the gross receipts from transactions between persons within and without the District attributable to the District was sustained in every case presented to this Court.²

All of Petitioner's receipts from the American Telephone & Telegraph Company and other telephone companies are for public utility services which it renders. Since all of Petitioner's facilities are located within the District, it is physically impossible for the Petitioner to render public utility services without the District. The fact that such services are rendered in connection with telephone calls which cross the District line is immaterial.³ However, even if Petitioner's lines and facilities extended beyond the District line, it would be proper to compute the tax upon that portion of its so-called "interstate" receipts derived from activities within the District of Columbia. *State v. Northwestern Telephone Exch. Co.*, 107 Minn. 390, 120 N. W. 534. The Minnesota law involved in the *Northwestern Telephone Exch. Co.* case imposed a tax at the rate of 3% upon gross earnings of each telephone company or

² *Neild & Sauerhoff v. D. C.*, 71 App. D. C. 306, 110 F. (2) 246; *General Electric Supply Corp. v. D. C.*, 71 App. D. C. 322, 110 F. (2) 262; *Butler Bros. v. D. C.*, 71 App. D. C. 326, 110 F. (2) 266; *Colgate Palmolive Peet Co. v. D. C.*, 71 App. D. C. 324, 110 F. (2) 264; *General Electric Co. v. D. C.*, 71 App. D. C. 321, 110 F. (2) 261; *California Packing Corp. v. D. C.*, 73 App. D. C. 53, 115 F. (2) 946; *Panitz v. D. C.*, 74 App. D. C. 284, 122 F. (2) 61; *Cedar Hill Cemetery Corp. v. D. C.*, ___ App. D. C. ___, 124 F. (2) 286.

³ *Western Live Stock v. Bureau of Revenue*, 303 U. S. 250; *Inter-Island Co. v. Hawaii*, 305 U. S. 306; *Neild & Sauerhoff v. District of Columbia*, 71 App. D. C. 306, 110 F. (2) 246; *James v. Dravo Contracting Co.*, 302 U. S. 134; *Matson Navigation Co. v. State Board of California*, 297 U. S. 441; *U. S. Express Co. v. Minnesota*, 223 U. S. 335.

system. In addition to the earnings reported from business done wholly within the State there was included in the tax base a proportion of the other earnings from the system based upon the proportion of the mileage within the State over which such business was done to the entire mileage of the Company over which said business was done. The Telephone Company contended that the language of the statute showed that the legislature intended to restrict the tax to earnings on business which originated and ended within the State of Minnesota. The Supreme Court of Minnesota, in sustaining the tax, said:

"* * * A fair and reasonable construction of the statute leads to the conclusion that the Legislature intended that a proportionate part of the earnings of the telephone companies, arising from interstate business, should be included in the gross earnings on which the tax was computed."⁴

It is the view of the Respondent that the method of taxing Petitioner's gross receipts employed by the Assessor is strictly in accordance with the provisions of the statute and the intention of Congress. However, if the Assessor's method of computing the tax should be rejected, it is the contention of the Respondent that the only alternative method would be to tax the entire receipts from all calls originating in the District without any deduction for any portion thereof remitted to other companies.

(c) *Allocation provisions unnecessary.*

Petitioner seems to take the view that the Assessor has made some allocation or apportionment of its gross receipts and Petitioner argues no such apportionment or allocation may be made in the absence of specific authority in the statute. In

⁴ Cf. *The Hecht Co. v. District of Columbia*, ___ App. D. C. ___, 129 F. (2) 353; *Adams Express Co. v. Ohio St. Auditor*, 166 U. S. 185; *Western Union Tel. Co. v. Dodge County*, 80 Neb. 18, 113 N. W. 805, aff. on rehearing, 80 Neb. 23, 117 N. W. 468.

support of such argument Petitioner relies upon the fact that the District of Columbia Income Tax Act (imposing taxes upon the income of corporations from District of Columbia sources) specifically provides for the apportionment and allocation of income within and without the District.

In the first place, there has been no apportionment or allocation of Petitioner's gross receipts. The Petitioner has no receipts which could be the subject of apportionment. Petitioner does not transmit messages beyond the District line and none of its receipts are for the transmission of messages or the performance of services beyond the District line.

The fact that the District Income Tax Act specifically provides for apportionment and allocation of income from within and without the District is not material to the question here presented. No apportionment formulas are used in determining Petitioner's income taxable under the District of Columbia Income Tax Act. Its entire income is from District sources and is so reported and taxed.

CONCLUSION

The Respondent respectfully submits that the decision of the Board of Tax Appeals for the District of Columbia should be affirmed.

Respectfully submitted,

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